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MONTANA LEGISLATIVE HISTORY

Chapter 521 Session L 1997
Bill House 345 Senate _____

History and final status sheet X
Introduced bill X
Fiscal note NA
Third reading bill X
Final version of bill X

House Committee on Business & Labor

Hearing date(s)* 2-6 2-17

Executive action (vote) date(s)* 2-17

Comm. Report not available

Floor 2nd reading & vote 2-22;4-9

Floor 3rd reading & vote 2-26;4-18

Senate Committee on Labor & Employer

Hearing date(s)* 3-11
3-20

Executive action (vote) date(s)* 3-20

Comm. Report 3-21

Floor 2nd reading & vote 4-4

Floor 3rd reading & vote 4-5;4-19

Conference or Free Conference Comm. X Yes _____ No

Hearing date(s)* 4-16

Executive action (vote) date(s)* 4-16

* Includes minutes, exhibits, roll call, visitors register, and vote sheet if available.

Did this bill originate in an interim committee? _____ Yes X No

Committee _____ Report _____

NOTES:



Compiled by: rg

Date: 3-31-2016

TRANSMITTED TO SENATE
 2/11 FIRST READING
 2/11 REFERRED TO NATURAL RESOURCES
 3/07 HEARING
 3/14 COMMITTEE REPORT—BILL CONCURRED AS AMENDED
 3/17 2ND READING CONCURRED 45 4
 3/18 3RD READING CONCURRED 41 8

 RETURNED TO HOUSE WITH AMENDMENTS
 4/09 2ND READING AMENDMENTS CONCURRED 86 13
 4/11 3RD READING CONCURRED AS AMENDED 96 0
 4/20 SIGNED BY SPEAKER
 4/24 SIGNED BY PRESIDENT
 4/25 TRANSMITTED TO GOVERNOR
 4/29 SIGNED BY GOVERNOR
 CHAPTER NUMBER 425
 EFFECTIVE DATE: 10/01/97

HB 345 INTRODUCED BY MASOLO

LC0972 DRAFTER: LANE

ADOPT THE WORKFORCE DRUG AND ALCOHOL TESTING ACT

1/24 INTRODUCED
 1/24 FIRST READING
 1/24 REFERRED TO BUSINESS & LABOR
 2/06 HEARING
 2/17 COMMITTEE REPORT—BILL PASSED AS AMENDED
 2/22 2ND READING PASSED AS AMENDED 50 48
 2/26 3RD READING PASSED 53 46

 TRANSMITTED TO SENATE
 3/03 FIRST READING
 3/03 REFERRED TO LABOR & EMPLOYMENT RELATIONS
 3/11 HEARING
 3/22 COMMITTEE REPORT—BILL CONCURRED AS AMENDED
 4/04 2ND READING CONCURRED 32 18
 4/05 3RD READING CONCURRED 30 20

 RETURNED TO HOUSE WITH AMENDMENTS
 4/09 2ND READING AMENDMENTS CONCURRED 73 27
 4/11 3RD READING NOT CONCURRED AS AMENDED 45 53
 4/12 CONFERENCE COMMITTEE APPOINTED
 4/16 HEARING
 4/16 CONFERENCE COMMITTEE DISSOLVED
 4/16 FREE CONFERENCE COMMITTEE APPOINTED
 4/17 FREE CONFERENCE COMMITTEE REPORT NO. 1
 4/18 2ND READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 55 43
 4/19 3RD READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 53 45

 SENATE
 4/14 CONFERENCE COMMITTEE APPOINTED
 4/16 CONFERENCE COMMITTEE DISSOLVED
 4/16 FREE CONFERENCE COMMITTEE APPOINTED
 4/17 FREE CONFERENCE COMMITTEE REPORT NO. 1
 4/18 2ND READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 48 0
 4/19 3RD READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 32 18
 4/21 SIGNED BY SPEAKER
 4/25 SIGNED BY PRESIDENT
 4/25 TRANSMITTED TO GOVERNOR

5/02 SIGNED BY GOVERNOR
 CHAPTER NUMBER 521
 EFFECTIVE DATE: 10/01/97

HB 346 INTRODUCED BY TROPILA, ET AL. LC1002 DRAFTER: ERICKSON

REVISE THE LAWS RELATING TO MANDATORY MOTOR VEHICLE INSURANCE

1/24 INTRODUCED
 1/24 FIRST READING
 1/24 REFERRED TO JUDICIARY
 1/24 FISCAL NOTE REQUESTED
 1/30 FISCAL NOTE RECEIVED
 2/03 FISCAL NOTE PRINTED
 2/05 HEARING
 2/12 TABLED IN COMMITTEE
 2/20 TAKEN FROM COMMITTEE AND PLACED ON 2ND
 READING 77 21
 2/24 2ND READING PASSED AS AMENDED 91 9
 2/26 3RD READING PASSED 90 10

 TRANSMITTED TO SENATE
 3/03 FIRST READING
 3/03 REFERRED TO JUDICIARY
 3/07 REVISED FISCAL NOTE REQUESTED
 3/10 REVISED FISCAL NOTE RECEIVED
 3/11 REVISED FISCAL NOTE PRINTED
 3/13 HEARING
 3/15 COMMITTEE REPORT—BILL CONCURRED AS AMENDED
 3/19 2ND READING CONCURRED 49 1
 3/20 3RD READING CONCURRED 49 1

 RETURNED TO HOUSE WITH AMENDMENTS
 4/09 2ND READING AMENDMENTS NOT CONCURRED 95 4
 4/10 CONFERENCE COMMITTEE APPOINTED
 4/14 HEARING
 4/14 CONFERENCE COMMITTEE DISSOLVED
 4/14 FREE CONFERENCE COMMITTEE APPOINTED
 4/15 FREE CONFERENCE COMMITTEE REPORT NO. 1
 4/15 FISCAL NOTE PRINTED
 4/16 HEARING
 4/16 FREE CONFERENCE COMMITTEE REPORT NO. 1
 4/17 2ND READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 99 1
 4/18 3RD READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 88 11

 SENATE
 4/11 CONFERENCE COMMITTEE APPOINTED
 4/14 CONFERENCE COMMITTEE DISSOLVED
 4/14 FREE CONFERENCE COMMITTEE APPOINTED
 4/17 FREE CONFERENCE COMMITTEE REPORT NO. 1
 4/17 2ND READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 47 0
 4/18 3RD READING FREE CONFERENCE COMMITTEE
 REPORT NO. 1 ADOPTED 49 0
 4/22 SIGNED BY SPEAKER
 4/25 SIGNED BY PRESIDENT
 4/25 TRANSMITTED TO GOVERNOR
 4/30 SIGNED BY GOVERNOR
 CHAPTER NUMBER 452
 EFFECTIVE DATE: 07/01/97

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS & LABOR

Call to Order: By **CHAIRMAN BRUCE SIMON**, on February 6, 1997, at 8:00 AM, in Room 104.

ROLL CALL

Members Present:

Rep. Bruce T. Simon, Chairman (R)
Rep. Paul Sliter, Vice Chairman (Majority) (R)
Rep. Robert J. "Bob" Pavlovich, Vice Chairman (Minority) (D)
Rep. Joe Barnett (R)
Rep. Rod Bitney (R)
Rep. Sylvia Bookout-Reinicke (R)
Rep. Charles R. Devaney (R)
Rep. David Ewer (D)
Rep. Kim Gillan (D)
Rep. Billie Krenzler (D)
Rep. Bob Lawson (R)
Rep. Rod Marshall (R)
Rep. Gay Ann Masolo (R)
Rep. Wes Prouse (R)
Rep. Carolyn M. Squires (D)
Rep. Jay Stovall (R)
Rep. Cliff Trexler (R)
Rep. Joe Tropila (D)
Rep. Carley Tuss (D)

Members Excused: None

Members Absent: None

Staff Present: Stephen Maly, Legislative Services Division
Pati O'Reilly, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 345, HB 391 (1/27/97); HB
399, JR 10; SB 152 (1/31/97)
Executive Action: SB 152; HB 399; HB 349; HB
406; JR 10; HB 341; HB 322

HEARING ON HJR 10

Opening Statement by Sponsor: Rep. Chase Hibbard, H.D. 54 introduced the bill. EXHIBIT 1 AND 2.

{Tape: 1; Side: 1; Approx. Time Count: 1.0; Comments: None.}

Proponents' Testimony:

Pat Haffey, Director Dept. of Labor

{Tape: 1; Side: 1; Approx. Time Count: 5.2; Comments: None.}

David Owen, MT Chamber of Commerce

{Tape: 1; Side: 1; Approx. Time Count: 7.0; Comments: None.}

Jamie Near, Westside Auto Body Shop

{Tape: 1; Side: 1; Approx. Time Count: 8.3; Comments: None.}

Pete Strizich, Helena, MT

{Tape: 1; Side: 1; Approx. Time Count: 14.6; Comments: None.}

Anne MacIntyre, Manager Human Rights Commission, St of MT

{Tape: 1; Side: 1; Approx. Time Count: 17.2; Comments: None.}

Frank Braun, Gold Nugget Body and Paint

{Tape: 1; Side: 1; Approx. Time Count: 17.4; Comments: None.}

Art Seiler, Helena small business owner.

{Tape: 1; Side: 1; Approx. Time Count: 22.1; Comments: None.}

Opponents' Testimony: None

Questions From Committee Members and Responses: None

Closing by Sponsor: Rep. Hibbard closed. EXHIBIT 3.

{Tape: 1; Side: 1; Approx. Time Count: 23.7; Comments: None.}

HEARING ON HB 345

Opening Statement by Sponsor: Rep. Gay Ann Masolo, H. D. 40 introduced the bill. EXHIBIT 4.

{Tape: 1; Side: 1; Approx. Time Count: 26.6; Comments: None.}

Proponents' Testimony:

Carl Schweitzer, MT. Contractors Assn.

{Tape: 1; Side: 1; Approx. Time Count: 34.0; Comments: None.}

Keith Papovich, Review of Positive Drug Testing.

{Tape: 1; Side: 1; Approx. Time Count: 35.1; Comments: None.}

Wayne Hall, Vice Pres. - JTI Group

{Tape: 1; Side: 1; Approx. Time Count: 38.4; Comments: None.}

Cindy Konesky, Kopp Construction Safety Manager

{Tape: 1; Side: 1; Approx. Time Count: 42.0; Comments: None.}

Ty Schultz, Member of Operators Union

{Tape: 1; Side: 2; Approx. Time Count: .2; Comments: None.}

Ward Shanahan, Stillwater Mining Co. Attorney

{Tape: 1; Side: 2; Approx. Time Count: 1.9; Comments: None.}

Steve Turkecwitz, Montana Auto Assn.

{Tape: 1; Side: 2; Approx. Time Count: 5.5; Comments: None.}

Ben Havdahl, MT Motor Carriers Assn. EXHIBIT 5.

{Tape: 1; Side: 2; Approx. Time Count: 6.0; Comments: None.}

Patrick Hayden, Empire Sand and Gravel, Billings

{Tape: 1; Side: 2; Approx. Time Count: 8.3; Comments: None.}

Ken Anderson, Mt. Chemnet Consortium

{Tape: 1; Side: 2; Approx. Time Count: 9.6; Comments: None.}

Don Allen, MT Wood Products Assn.

{Tape: 1; Side: 2; Approx. Time Count: 12.1; Comments: None.}

Charles Brooks, Billings Area Chamber of Commerce

{Tape: 1; Side: 2; Approx. Time Count: 13.8; Comments: None.}

Riley Johnson, National Ind. and Small Businessmen of MT

{Tape: 1; Side: 2; Approx. Time Count: 14.4; Comments: None.}

Russ MacDonald, Human Resource Director, Dept. of Transportation. EXHIBIT 6.

{Tape: 1; Side: 2; Approx. Time Count: 15.3; Comments: None.}

Opponents' Testimony:

Don Edwards, Oil, Chemical and Atomic Workers. EXHIBITS 7, 8, 9.

{Tape: 1; Side: 2; Approx. Time Count: 17.0; Comments: None.}

Ed Logan, Exxon employee and member of Pipefitters Union.

{Tape: 1; Side: 2; Approx. Time Count: 27.4; Comments: None.}

Terry Minnow- Union Lobbyist, Mental Health Care Care Employee Union.

{Tape: 1; Side: 2; Approx. Time Count: 28.6; Comments: None.}

John Eisenbaum-Stillwater Mining Co.

{Tape: 1; Side: 2; Approx. Time Count: 29.4; Comments: None.}

Darrell Holzer, AFL-CIO

{Tape: 1; Side: 2; Approx. Time Count: 29.9; Comments: None.}

Scott Crichton, ACLU. EXHIBIT 10.

{Tape: 1; Side: 2; Approx. Time Count: 32.8; Comments: None.}

Russell Houle, Mt. Trial Lawyers

{Tape: 1; Side: 2; Approx. Time Count: 39.1; Comments: None.}

Micheal Bentley, Am. Federations of County and State Employees.
{Tape: 2; Side: 1; Approx. Time Count: 4.0; Comments: None.}

Dave Bizaro, Pres. Local OCAW
{Tape: 2; Side: 1; Approx. Time Count: 4.8; Comments: None.}

Questions From Committee Members and Responses:
{Tape: 2; Side: 1; Approx. Time Count: 5.5; Comments: None.}

Closing by Sponsor:Rep. Masolo closed.
{Tape: 2; Side: 1; Approx. Time Count: 40.6; Comments: **Chairman Simon** formed sub-committee for HB 345. Rep. Stovall, Chairman, Reps. Bitney, Masolo, Krenzler and Gillan.}

HEARING ON SB 152

Opening Statement by Sponsor: Senator Walt McNutt, S. D. 50 introduced the bill.
{Tape: 2; Side: 2; Approx. Time Count:.0; Comments: None.}

Proponents' Testimony:
John Cadby, Montana Bankers Assn.
{Tape: 2; Side: 2; Approx. Time Count: 2.6; Comments: None.}

Brenda Nordling, Dept. of Justice
{Tape: 2; Side: 2; Approx. Time Count: 5.3; Comments: None.}

Steve Turkewich, MT Auto Assn.
{Tape: 2; Side: 2; Approx. Time Count: 7.0; Comments: None}

Dave Brown, Montana Auto Retailers
{Tape: 2; Side: 2; Approx. Time Count: 7.6; Comments: None.}

Bob Pyfer, MT Credit Union League
{Tape: 2; Side: 2; Approx. Time Count: 8.0; Comments: None.}

Opponents' Testimony: None.

Questions From Committee Members and Responses:
{Tape: 2; Side: 2; Approx. Time Count: 8.6; Comments: None.}

Closing by Sponsor: Sen. McNutt closed.
{Tape: 2; Side: 2; Approx. Time Count: 12.3; Comments: None.}

HEARING ON HB 391

Opening Statement by Sponsor: Rep. Sam Rose, H. D. 87 introduced the bill. EXHIBIT 11.
{Tape: 2; Side: 2; Approx. Time Count: 13.; Comments: None.}

HOUSE OF REPRESENTATIVES

BUSINESS AND LABOR COMMITTEE

ROLL CALL

DATE 2/6/97

NAME	PRESENT	ABSENT	EXCUSED
Bruce Simon, Chairman	✓		
Paul Sliter Vice Chairman	✓		
Bob Pavlovich, Vice Chairman	✓		
Joe Barnett	✓		
Rod Bitney	✓		
Sylvia Bookout	✓		
Charles Devaney	✓		
David Ewer	✓		
Kim Gillan	✓		
Billie Krenzler	✓		
Bob Lawson	✓		
Rod Marshall	✓		
Gay Ann Masolo	✓		
Wee Prouse	✓		
Carolyn Squires	✓		
Jay Stovall	✓		
Cliff Trexler	✓		
Joe Tropila	✓		
Carley Tuss	✓		

EXHIBIT 4DATE 2/6/97HB 345

HOUSE BILL NO. 345

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE PRIVATE WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL TESTING PROGRAMS; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 5] may be cited as the "Private Workforce Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 5], the following definitions apply:

[1] "Alcohol" means an intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

[2] "Alcohol Concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test.

(1) "Controlled substance" means a dangerous drug, as defined in 49 CFR part 40 as 50-32-101, and listed in Schedules I or II in 50-32-222 and 50-32-224, except a drug used pursuant to a valid prescription or as authorized by law.

(2) "Employee" means an individual engaged in the performance of work for a private employer and does not include an independent contractor.

(3) "Employer" means a person or entity in the private sector that has one or more employees and that is located in or doing business in Montana.

(4) "Medical review officer" means a ~~state~~ licensed physician trained in the field of substance abuse.

(5) "Prospective employee" means an individual who has made a written or oral application to an employer

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(Introduced)

1 to become an employee.

2 (6) "Qualified testing program" means a program to test for the presence of controlled substances and
3 alcohol that meets the criteria set forth in [sections 4, 5 and 6].

4 (7) "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled substance or a
5 breath alcohol test to determine the presence of alcohol.

6
7 **NEW SECTION. Section 3. Limitations on employer liability.** (1) An employer is not liable for
8 monetary damages arising out of a drug or alcohol test that the employer requires an employee or prospective
9 employee to take if the test is administered pursuant to a qualified testing program that is adopted and
10 implemented by an employer to test employees for the presence of controlled substances or alcohol, unless:

11 (a) the employer took disciplinary action against the employee based on a false test result and the
12 employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable
13 presumption that an employer's reliance on a test result is reasonable if the employer complies with the
14 provisions of [sections 4 and 5] and rules adopted pursuant to [sections 4 and 5].

15 (b) the employer committed defamation of character, libel, slander, or damage to reputation, as established
16 by statute or common law, by knowingly disclosing false test results with malice.

17 (2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails to detect a
18 specific controlled substance or other substance, disease, infectious agent, virus, or physical abnormality,
19 problem, or defect of any kind.

20
21 **NEW SECTION. Section 4. Qualified testing program.** A qualified testing program must comply
22 with the following criteria:

23 (1) Testing must be conducted according to the terms of written policies and procedures that must be
24 adopted by the employer and must be available for review by all employees and prospective employees 60
25 days before implementation. Controlled substance and alcohol testing procedure shall conform to 49 CFR,
26 part 40. At a minimum, the policies and procedures must require:

27 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful
28 manufacture, distribution, possession, or use of a controlled substance;

29 (b) the employer's proposal for educating or providing information to employees on the health risks
30 associated with the use of controlled substances and alcohol;

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(Introduced)

1 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by
2 employees;

3 (d) a description of available employee assistance programs, including drug and alcohol counseling,
4 treatment, or rehabilitation programs that are available to employees;

5 (e) a description of the sanctions that the employer may impose on an employee if the employee is found
6 to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test
7 positive for the presence of a controlled substance or alcohol;

8 (f) a statement that employees may be tested, including a ~~description~~ discussion of the circumstances that
9 may trigger an immediate test;

10 (g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration
11 level above which a tested employee will be sanctioned;

12 (h) a description of the employer's hiring policy with respect to prospective employees who test positive;

13 (i) a detailed description of the procedures that will be followed to conduct the testing program, including
14 the resolution of a dispute concerning test results;

15 (j) a provision that all information, interviews, reports, statements, memoranda, and test results are
16 confidential communications that may not be disclosed to anyone except:

17 (i) the tested employee;

18 (ii) employees or agents of the employer who are specifically authorized by the tested employee to ~~receive~~
19 receive the employee's test results; or

20 (iii) in a proceeding related to a legal action arising out of the employer's implementation of [sections 1
21 through ~~5~~ 6] or in response to inquiries relating to a workplace accident involving death, physical injury, or
22 property damage in excess of \$1,500, when there is reason to believe that the tested employee may have
23 caused or contributed to the accident; or

24 (k) a provision that information obtained through testing that is unrelated to the use of a controlled
25 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be
26 released to the employer.

27 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards
28 of conduct, an employer may require an employee who tests positive on a test for controlled substances or
29 alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a
30 condition of continued employment. An employer may require the employee to submit to periodic follow up

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(Introduced)

1 testing as a condition of the counseling, treatment, or rehabilitation program.

2 (3) Testing must be at the employer's expense, and all employees must be compensated at the
3 employee's regular rate, including benefits, for time attributable to the testing program.

4 (4) The collection, transport and testing of urine samples must be performed in accordance with 49 CFR
5 part 40, a manner designed to protect the privacy of the employee, using, when practicable, screens or stalls,
6 except that if an employer has reason to believe an employee may adulterate or substitute the required
7 sample, the employer may require that the sample be provided under the direct supervision of testing
8 personnel.

9 ~~—(5) Samples must be handled under strict forensic chain of custody procedures. The procedures must~~
10 ~~require that a sample be collected, stored, and transported in a manner that documents and preserves the~~
11 ~~identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
12 ~~results.~~

13 ~~—(6) Testing of samples must be performed according to scientifically accepted analytical procedures by a~~
14 ~~qualified laboratory certified by the federal department of health and human services national institute on drug~~
15 ~~abuse. Confirmatory tests of an initial screening test must be conducted by the same laboratory using gas~~
16 ~~chromatography mass spectrometry techniques or techniques that are of comparable or superior quality with~~
17 ~~respect to validation.~~

18 (7) Before an employer may take any action based on a positive test result, the employer shall have the
19 results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An
20 employee or prospective employee must be given the opportunity to provide notification to the medical
21 review officer of any medical information that is relevant to interpreting test results, including information
22 concerning currently or recently used prescription or nonprescription drugs.

23 [8] Breath alcohol tests can only be done utilizing testing equipment that appears of the federal conforming
24 products list of the federal register. All breath alcohol tests shall be administered by a certified breath alcohol
25 technician.

26 [9] A breath alcohol test result must have an alcohol concentration of greater than 0.02 for a person to be
27 considered having alcohol in their body.

28 NEW SECTION. Section 5. An employer can utilize any of the following tests in a qualified testing
29 program.

30 1. Pre-employment testing: An employer may test new hires within five days of reporting to work.

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(Introduced)

1 2. Random Testing: An employer may utilize random testing if their drug policy includes either of the
2 following procedures:

3 a. The employer or an employer representative can establish a date(s) when all employees present at a
4 work site including all salaried and hourly employees will be required to be drug and or alcohol tested.

5 b. An employer can manage or contract with a third party administrator a consortium to establish a
6 random testing process which must contain the following elements:

7 i an established calendar period for testing

8 ii an established testing rate within the calendar period

9 iii a random process that will be utilized to select the employees to be drug and alcohol tested. The
10 selection of employees in a random testing shall be made by a scientifically valid method, such as a random
11 number table or a computer based random number generator table.

12 iv The employer shall get a signed statement from each employee that he/she has received a copy of
13 the random process and this statement shall be maintained in the employees personnel file.

14 3. Post Accident Testing: When an employer has reason to believe that an employee may have
15 contributed to a work-related accident that causes death or personal injury or property damage in excess of
16 \$1,500, the employee may be tested for controlled substances or alcohol.

17 4. Follow up testing: If an employee has been found to have misused controlled substances or alcohol in
18 the work place the employer may require an employee to submit to follow up testing, as defined by the
19 employer's written controlled substance and alcohol abuse policy, for up to one year to insure no further use
20 of controlled substances or alcohol on the job.

21 5. Reasonable suspicion testing: An employer may require an employee to be tested for controlled
22 substances or alcohol if the employer has reason to believe that an employee's faculties are impaired on the
23 job as a result of alcohol consumption or use of controlled substances as per 49 CFR Part382.603.

24 NEW SECTION. Section 6. EMPLOYEES RIGHT OF REBUTTAL The employer shall provide the
25 employee who has been tested under any qualified testing program with a copy of the test report and afford
26 the opportunity, at the employee's expense, to obtain the testing of the urine split sample by an independent
27 laboratory selected by the person tested.

28 NEW SECTION. Section 7. SEVERABILITY. If a part of [this Act] is invalid, all valid parts
29 that are severable from the invalid part remain in effect. If a part of [this Act] is invalid in one or more of its
30 applications, the part remains in effect in all valid applications that are severable from the invalid applications

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(Introduced)

1
2 **NEW SECTION. Section 8. Confidentiality of results.** (1) Except as provided in subsection (2)
3 and except for information that is required by law to be reported to a state or federal licensing authority, all
4 information, interviews, reports, statements, memoranda, or test results received by an employer through a
5 qualified testing program are confidential communications and may not be used or received in evidence,
6 obtained in discovery, or disclosed in any public or private proceeding.

7 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

8 (a) legal action arising out of an employer's implementation of [sections 1 through 5]; or

9 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess
10 of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the
11 accident.

12
13 **Section 9.** Section 39-2-304, MCA, is amended to read:

14 **"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~ (1)** A
15 person, firm, corporation, or other business entity or its representative may not require:

16 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test or any~~
17 ~~form of a mechanical lie detector test; as a condition for employment or continuation of employment.~~

18 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for employment in:~~

19 ~~—(i) hazardous work environments;~~

20 ~~—(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

21 ~~—(iii) jobs involving the intrastate commercial transportation of persons or commodities by a commercial~~
22 ~~motor carrier or an employee subject to driver qualification requirements; and~~

23 ~~—(c) as a condition for continuation of employment, an employee to submit to a blood or urine test, except~~
24 ~~when:~~

25 ~~—(i) the employer has reason to believe that the employee's faculties are impaired on the job as a result of~~
26 ~~alcohol consumption or illegal controlled substance use;~~

27 ~~—(ii) the employer has reason to believe that an employee may have contributed to a work-related accident~~
28 ~~that causes death or personal injury or property damage in excess of \$1,500; or~~

29 ~~—(iii) controlled substance testing is being conducted at an employee's regular biennial physical for~~
30 ~~employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

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(Introduced)

1 ~~—(2) Prior to the administration of a controlled substance or alcohol test, the person, firm, corporation, or~~
2 ~~other business entity or its representative shall adopt the written testing procedure that is provided in 40 CFR,~~
3 ~~part 40, and make it available to all persons subject to testing.~~

4 ~~—(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of~~
5 ~~controlled substance or alcohol test results to the person tested and provide the person with the opportunity,~~
6 ~~at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
7 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
8 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
9 ~~(1)(c)(ii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
10 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
11 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of~~
12 ~~the finding. The written record of a blood or urine test of an employee who is required to submit to testing~~
13 ~~pursuant to subsection (1)(c)(ii) and whose acts or failure to act is subsequently found not to be the direct or~~
14 ~~proximate cause of a work related accident must be removed from the employee's work record and be~~
15 ~~destroyed.~~

16 ~~—(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if~~
17 ~~the person tested presents a reasonable explanation or medical opinion indicating that the results of the test~~
18 ~~were not caused by alcohol consumption or illegal drug use.~~

19 ~~—(5) A person who violates this section is guilty of a misdemeanor.~~

20 ~~—(6) As used in this section:~~

21 ~~—(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 60-12-101; and~~

22 ~~—(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this state."~~

23
24 **NEW SECTION. Section 10. Codification Instruction.** [Sections 1 through 5] are intended to be
25 codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2, apply
26 to [sections 1 through 5].

27 -END-

Exhibit 5

SAFETY REGULATIONS

PARTS 40, 382, 383, 390-397

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Exhibit # 5 - 533 page —
regulations book —

The full exhibit is available from:

MT Historical Society Archives

225 North Roberts

P. O. Box 201201

Helena, MT 59602-1201

Phone: (406) 444-4775

Exhibit 5
Date 2/6/97
HB 345

EXHIBIT 6
DATE 2/6/97
HB 345

HB345

The Department of Transportation has the following concerns about HB345:

- HB345 removes the language from existing law that allows any employer to test when there's reasonable suspicion of drug or alcohol use, and limits drug and alcohol testing to private employers. This may prevent public employers from testing even when there is reasonable suspicion. See HB345 section 6, page 5, lines 10-13.

We suggest: deleting the reference to private employers in this bill or include a provision to allow public employers to conduct test when there's reasonable suspicion.

- The existing law (see HB345, section 6, lines 14 and 15) has a provision that allows testing if an employee may have contributed to a death or accident resulting in \$1500 damage or injury. HB 345 removes this trigger but has legal protection for an employer under these circumstances.

We suggest: Removing the language that relates to \$1500 in damages or injury. Without the language to require a test under these circumstances, the bill leaves a lot of gray area if an employer decides to use any amount of damage less than \$1500 as a triggering condition, they're not protected by the language in this bill.

Requiring a dollar amount for damages is impractical under any circumstances because by the time the amount of damage is determined, most drugs and alcohol would not be detectable. This eliminates the advantage of conducting a test.

OCAW

Oil, Chemical & Atomic Workers
International Union, AFL-CIO



Dan C. Edwards
International Representative
P.O. Box 21635
Billings, MT 59104
406/669-3253

EXHIBIT 7
DATE Feb 6/97
HB 345

HB 345

Statement of:

Dan C. Edwards, International Representative
Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO
P.O. Box 21635
Billings, MT 59104

406-669-3253

STATEMENT FOR THE HOUSE BUSINESS and LABOR COMMITTEE
February 6, 1997, 8:00 a.m.
BRUCE SIMON, CHAIR

Chairman Simon and Members of the Committee:

My name is Dan C. Edwards, International Representative for the Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW). OCAW represents nearly 1000 members in the State of Montana, including employees of the Conoco and Exxon refineries in Billings, the Cenex refinery in Laurel, the Stillwater Mining Company mine, mill and smelter in Nye and Columbus, the Montana Refining Company in Great Falls, and Montana Power Company in Cut Bank and Shelby.

This statement is to indicate OPPOSITION to HB 345.

First, I want to make it clear that OCAW does not support or condone the use of drugs or alcohol on-the-job, or coming to work under the influence of any substance. However, unless there is objective evidence that worker is impaired on-the-job, or that the worker's job performance is effected, workers have the same rights as any other Montanan against unwarranted intrusion into their private life away from the workplace.

Montana's current drug testing law does not need the major overhaul this bill proposes. We already have an excellent law which balances the legitimate interests of employers to have employees who are not impaired by drugs or alcohol, while at the same time protecting the individual privacy rights of employees as set forth in the Montana State Constitution.

- 1 -

~~CONFIDENTIAL~~

17

The first version of HB 345 looks very much like SB 138 from 1991, which comes out of a White House organization known as the "Institute for a Drug Free Workplace". Interesting that many legislators this session who are so concerned about the intrusion of the federal government, would seriously consider legislation that is being foisted on Montana by the feds.

A brief review of the history of employee drug testing legislation in Montana might be useful:

1987:

Senator Paul Boylan introduced SB 338. The legislative history records the following: "He (Senator Boylan) told a story about his own dairy farm and how the milk inspectors tested the milk for a virus, and found it. They shut him down without a second opinion. Senator Boylan said when he got a second opinion, the milk tested negative for the virus. He felt a drug test of humans or animals should get a second change in the testing process." Montana's law still provides for that second test.

1989:

No changes.

1991:

Major changes were proposed. SB 138 by Senator Steinmetz came from the same federal source as I believe SB 345 did. Senator Towe introduced SB 31. Some of you may recall that I was very involved in the legislative process during the 1991 session. Steve Browning and I played a major role in working out the compromise which was eventually adopted. The final package was adopted in HB 110 (Gilbert) which allowed testing for intra-state truck drivers. A lot of effort went into forging this basis for the current law which both sides could live with. This was compromise legislation which afforded reasonable protections for both employer and employee alike.

1993:

No changes.

1995:

SB 201 was introduced by Senator Burnett. Again, a compromise was reached which expanded circumstances under which employees could be tested after an accident, but also provided some protection for employees if it was later determined that the tested employee had nothing to do with the accident.

The bottom line is that through a lot of hard work, and in a spirit of cooperation, Montana enjoys an excellent employee drug testing law. There is absolutely no evidence and statistics which indicate that there is any need to now change this good law. There may be some employees that don't understand why some employees are tested under federal regulations, while others are covered under State law. But, I have never had an employee come to me and say they wanted, or were even willing, to be subject to random testing.

Another factor you should be aware of is that in 1985, when I first became involved in employee workplace drug testing, the number of laboratories doing drug testing were few, primarily forensic labs or labs set up for other purposes, hospitals, etc.. The number of companies in the drug testing business today has grown dramatically, making millions and millions of dollars either collecting or testing urine. Most didn't even exist 10 years ago. Today there are 70 drug testing laboratories on the DHHS Certified list alone.

I have included some examples of the enormous amount of money these labs take in (Attachment I). Note these are quarterly earnings. It doesn't take a rocket scientist to see that this is one of the major driving forces, regardless of the reasons put forth.

Another concern with HB 345 is the limitations on employer liability. If an employer is conducting a fair and reasonable drug testing program which meets the standards provided under Montana law, they need no special shield from liability. While I am not an attorney, I question whether this is in conflict with Section 40.25(f)(22)(ii) of 49 CFR Part 40, which provides in part, "The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others." This is a far cry from "malice".

Drug testing is expensive, and I assume the costs will continue to go up. Some Government Accounting Office figures that I have read puts the cost at \$73/test. Some other government figures I have seen place the cost for each positive test at \$77,000. The American Management Association has done a workplace drug testing survey for the past seven or eight years. I have reviewed a copy of the January 1992 survey. It shows a small decrease in the number of companies doing testing. Instituting drug testing increases costs dramatically. The average cost per testee in

1991 was \$41. One large company spent \$500,000 and found 8 positives, for an average of \$62,500 per positive. Thirteen additional companies spent more than \$10,000 per positive finding." I read in the January 1993 issue of Drug Detection Report that a number of companies have decided to deal with drug and alcohol abuse with education, supervisory training, and Employee Assistance Programs instead of testing. This has doubled over the past five years from 12% to 24% of respondents. I think we'll see more and more of that. (Please note the figures used in this paragraph were developed in 1993.)

Finally, and perhaps most importantly, the inclusion of random testing into an employer's drug testing policy would raise serious questions regarding the privacy provisions of the Montana State Constitution. I strongly suspect that court challenges would result from the adoption of any form of random testing. You should ask yourself if this really contributes anything to workplace safety. I submit it does not.

While I maintain that a DO NOT PASS is the best action for this unnecessary proposal, I would be more than happy to work with this committee or the sponsor to attempt to work out more acceptable language if that is desired. I understand that one of the concerns of the supporters of this bill is what might be considered as a "hazardous work environment". We are agreeable to defining that term so the law is clear as to who is covered; remembering that it only applies to pre-employment testing. Under current law any employer who has adopted a testing policy that conforms with CFR 49, Part 40, may test any employee if "the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use".

Thank you for your consideration of my testimony.

#####

Drug Detection Report™

THE NEWSLETTER ON DRUG TESTING IN THE WORKPLACE

Truckers Seek Company-Based Relief in DOT Random Testing

The Interstate Truckload Carriers Conference (ITCC) has petitioned the Federal Highway Administration (FHWA) to ease its random drug and alcohol testing requirements for individual companies with low positive random rates.

Federal regulations say the FHWA may allow the trucking industry to test at lower rates than currently required if the industry as a whole has low positive random rates for two consecutive years.

The ITCC and four of its members said in the petition that a company-based system as opposed to an industry-based system should be used in order to reward those companies with good records. The current system, they said, is a "burden."

The ITCC said some of its members have records that — if met by the entire trucking industry — would entitle the industry to lower mandated random drug testing rates. Joining the petition were four such companies that, according to the petition, had two consecutive years of low positive rates for drugs. (Department of Transportation-regulated random alcohol testing for trucking began in 1995.)

The petition coincides with an attempt by another organization to get the Department of Transportation to alter its random drug and alcohol testing procedures —

but in a way that could result in more testing, not less. The Substance Abuse Program Administrators Association (SAPAA) wants the DOT to set random testing rates separately for regulated companies that are contracted to perform work for DOT-regulated employers. An unscientific poll conducted by SAPAA found, in general, that contracted workers get higher positive rates on random tests than regular employees. SAPAA

(continued on page 2)

On-Site Drug Test Producers Expand Their Product Lines

Manufacturers of on-site drug testing kits are expanding their product lines in an effort to offer a wider array of versatile, "user-friendly" tests that they hope will fit the needs of various customers.

Depending on the needs of the company interested in testing its employees or job applicants for illegal drugs, it can order products that test for a single drug, two drugs, or an entire array of drugs. Some manufacturers, reacting to market research indicating that customers use laboratory services because they do not want to get involved in handling employees' urine, have designed their products to reduce or eliminate that aspect of on-site testing.

Aside from the test kit itself, manufacturers of on-site systems have sought to differentiate themselves through the support services they can offer. One on-site company, for example, also owns a drug testing laboratory that can conduct confirmation tests of positive on-site results.

On-site products — which cannot be used for federally mandated drug testing — have some features in common. Each manufacturer has tried to make its products the easiest and clearest for nonspecialists to interpret. Quick turnaround, with results provided in minutes, is another common selling point.

Some manufacturers offer more than one product line of on-site drug test kits. EDITEK, Inc., announced earlier this month that it was expanding its VERDICT

See *Article* (continued on page 6)

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LabCorp takes two laboratories out of federally certified program.....	4
New Congress expected to deal with drug testing of Congressional employees.....	5
Lab official decries 'shortcomings' of on-site drug testing.....	7
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November 20, 1996

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See *ATTACHMENT* (continued on page 6)

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Letters

To the Editor:

I read with great interest your article entitled "On-Site Drug Testing Kits Advance in Workplace Market" in your October 21, 1996, edition of *Drug Detection Report*. Unfortunately what I didn't see in the article was a description of any of the shortcomings an employer might face while using on-site testing. Those in the drug testing marketplace would be wise to balance time and convenience issues with the limitations. The most glaring weakness of on-site tests is that they provide no way of detecting the most common means of attempting to beat a urine drug test: diluting the urine by drinking large amounts of fluids before the specimen is collected. These kits do not determine if the specimen presented is actually urine. This raises the issue of a strong potential of employers making employment decisions based on false negative results.

In addition, collection site personnel, or company personnel if performing on-site, have less experience in identifying the wide array of adulterants that are used to avoid detection. *It is as important to correctly identify an adulterated specimen as it is to identify a positive specimen.* Certified laboratories have experience in detecting adulterated specimens and often have specific procedures which can identify the adulterant in a forensically defensible manner.

In general, objectivity is compromised when on-site testing is performed by employer personnel. Likewise, privacy and confidentiality can be compromised and offer potential for fraud. If the donor is known to the collector, and the test is performed in the presence of the donor, the collector knows the screen positive result. In laboratory testing, the collector is not likely to learn the result and the laboratory most often does not have the name of the donor, only identifying numbers. This can put the collector in the tempting position of revealing to others the results of the initial test, which might eventually fail to be confirmed as these are screens (presumptive positives). A presumptive positive also does not account for donors who have a legitimate medical explanation. There is also potential for collectors to be approached by donors to call the test negative for financial remuneration, a bribe.

Specimens which are positive for drugs that are near the cut-off concentration are more likely to be reported as negative by this technology than when the test is performed in a laboratory with calibrated and

controlled instrumentation, if a full amount of specimen is not delivered.

Many in the industry feel that on-site testing could tempt employers to perform screen-only testing, accepting the results of unconfirmed screen tests (presumptive positives) and not spending the extra time and effort to get confirmations, particularly when the testing is for pre-employment purposes. No one should be denied a job based on a screen-only, unconfirmed positive result.

On-site testing may create greater legal exposure and liability to companies who use their own employees or to collection sites who read these test results.

These issues have significant implications for anyone using on-site testing for decisions in the employment arena. It is my understanding that many of these kits received initial FDA approval for use in emergency medical facilities and not for employment drug testing.

[David G. Evans, a proponent of on-site drug testing quoted in the article,] would have us believe that it would be acceptable to compromise confidentiality not only by having an employee of the company read the test result but also an additional union representative observe the process....

[Michael A. Terretti, executive vice president of Medtox,] would have us believe that "98 percent of samples sent to laboratories are negative." If the positivity rate in the private sector is between 6 and 7 percent, then Mr. Terretti's math is a bit off.

Richard A. Etter, Ph.D., CHE, CMHA
Vice President/Occupational Testing
ARUP Laboratories
Salt Lake City, Utah, Nov. 8, 1996

Briefly...

- EDITEK, Inc., a publicly traded provider of drug testing products and services, has scheduled its annual meeting of shareholders for Dec. 19 in Minneapolis. The Burlington, N.C.-based company had postponed a previously scheduled annual meeting.

- PharmChem Laboratories, Inc., reported quarterly sales of \$10,631,000 and a "return to profitability" in the quarter ended Sept. 30. "The return to profitability in the third quarter was the result of reduced operating costs in the lab and higher average selling prices," said Joe Halligan, the company's president and chief executive officer. □

Julie Murdoch Leaves FAA And Joins Bensinger, DuPont

Julie Murdoch, a drug testing official with the Federal Aviation Administration, has left the government and joined the management consulting firm Bensinger, DuPont and Associates.

The firm, which has offices in Chicago and Rockville, Md., announced last month that Ms. Murdoch is its new director of DOT testing programs. In that capacity, the announcement said, she will be involved in providing consulting services for all aspects of Department of Transportation drug testing, with emphasis on FAA regulations.

Ms. Murdoch served with the FAA's Drug Abatement Division, where she was manager of the Special Projects Branch. She is credited with involvement in the drafting, preparation, and interpretation of regulations for the aviation industry and other transportation modes.

She was the United States representative to an international study group of substance abuse in aviation established by the International Civil Aviation Organization.

Before joining the FAA in 1990, Ms. Murdoch, a lawyer, served as a military judge advocate and as a management consultant. □

Letters

To the Editor:

Mr. Donald E. Veraska has misquoted me in his article titled "Competition Leads to Tensions Between Labs and Administrators" (*Drug Detection Report*, Aug. 20). On page six, paragraph 3, I am quoted as believing that the answer to Lab/MRO/TPA competition is either a class action suit against the labs or individual suits against the labs for restraint of trade. I wish it to be made very clear that *I did not tell Mr. Veraska that I thought this was the answer*. I did say that I have heard that there have been some TPAs within the industry who have discussed these two possibilities.

What I do believe is that, in the long run, it will be the DOT who will have to confront and decide the issue.

Ira Jane Hurst
Ira Jane Hurst & Associates
Lafayette, La., Aug. 26, 1996

Briefly...

- The Institute for a Drug-Free Workplace has established a site on the World Wide Web. Among other things, the site enables members, customers, and other interested parties to electronically order publications and request membership information and other information. Among some of the information contained in the site are the institute's policy statement, biographies of staff members, a catalog of publications, and news about the institute. The institute also plans to have links to other sites. The address of the site is <http://www.drugfreeworkplace.org>. For more information, call Daryl G. Grecich at the institute at (202) 842-7400.

- The Substance Abuse Program Administrators Association's last regional meeting for 1996 is scheduled for Nov. 15 in Durham, N.C. The all-day meeting will be held at the Durham Hilton. Federal officials representing the Department of Transportation, the Department of Defense, the Department of Energy, and the Nuclear Regulatory Commission are scheduled to give presentations. In addition, representatives of companies that are regulated by those agencies also are scheduled to speak. The registration fee is \$145 for association members and \$195 for non-members. For further information, contact the association at (847) 699-1666. The association's other regional meeting for this year took place in July.

- The annual conference of the Society of Forensic Toxicologists is scheduled for Oct. 14-18 in Denver, at the Denver Marriott Tech Center. The date and city given in a recent issue of *Drug Detection Report* referred to the 1997 annual conference. For further information, contact Robert Zettl at (303) 691-4700.

- PharmChem Laboratories, Inc., a drug testing lab headquartered in Menlo Park, Calif., reported sales of \$10,771,000 for the second quarter ended June 30, an 11 percent increase over sales for the comparable period in 1995. For the six months ended June 30, 1996, sales were \$20,638,000, which was 11 percent higher than for the same time period in 1995. The company attributed the increases primarily to an increase in the number of specimens analyzed.

- Scintrex, Inc., based in Toronto, has introduced a new handheld narcotic detection system called the NDS-2000. The device, which weighs less than 10 pounds, can be held in the hand and is capable of detecting cocaine, heroin, marijuana, amphetamines, and methamphetamine on surfaces, the company said. □

Julie

Collection Site Association Urges Voluntary Training

The National Association of Collection Sites (NACS), which represents 1,600 members of the drug collection industry, wants the Department of Transportation to call for better education, training, and industry initiatives to improve collections of urine samples for drug tests.

The association has postponed for a month or two adoption of the final version of an accreditation program for drug collection sites, said Executive Director Carolyn Koke, because member firms asked for additional time due to summer vacations.

"The proper supervision and education of collection personnel is probably the largest single factor affecting the quality of that site's collections, and in reducing the number of rejected specimens. We suggest DOT take steps to urge, on a voluntary basis, this type of training and education," Ms. Koke wrote to the DOT.

Industry Courses Noted

She added that there are many collector training courses offered by private industry, and NACS is in the final stage of accrediting these sites and certifying collection personnel.

"Our association believes that initiatives such as these will ultimately be more effective than new federal mandates in improving the industry," Ms. Koke said.

"However," she added, "collection sites will need encouragement from DOT to implement quality control procedures in their collection sites. Improved training, education, and supervision means the dedication of time and resources which sometimes get a low priority."

While the association believes that DOT should use training and quality control procedures as a guide for collection sites, "this direction should not be in the form of a mandate, which we believe would be inflexible and not applicable to the individual circumstances of every collection site."

NACS said last month that the new organization was created because DOT "has made it clear that the collection process was the weakest link in the drug testing process," and that through a certification program, NACS could strengthen the process through standards of operations and training of employees. □

Briefly...

- In one of the final comments to the Department of Transportation for changes in its Part 40 drug testing regulations, the Long Island Rail Road (LIRR) has asked the Department of Transportation to reduce from 25 percent to 10 percent the random drug testing rate of railroad workers under DOT jurisdiction. The Department of Transportation, which allows its six operating agencies to set random test percentages, told *Drug Detection Report* that any changes in the percentages of random tests were up to the Federal Railroad Administration and not a matter to be considered under Part 40. "Our research has shown that the perception by employees that we can randomly test them anytime or place is more important to deterrence than the actual rate," LIRR said in its comment to the DOT. "A 10-percent rate along with LIRR's strong enforcement policies would be more than enough to deter usage."

- Laboratory Specialists of America, Inc., of Oklahoma City, announced that revenue had increased 22.6 percent in the first six months of 1996 to a record of \$4.24 million, from \$3.46 million for the first six months in 1995. Management of the Nasdaq-traded stock said net income available to common stockholders for the first half of this year increased to 12 cents a share, compared to 11 cents a share last year. Laboratory Specialists of America owns and operates a nationally certified laboratory providing employee drug testing to corporate and institutional clients.

- Editek, Inc., a drug testing company based in Burlington, N.C., reported a net loss of \$264,000 on revenues for the second quarter of \$7,657,000.

- No laboratories were added or removed from the National Laboratory Certification Program during July, the Substance Abuse and Mental Health Services Administration announced Aug. 1. Listed by the Department of Health and Human Services agency were 73 labs, the same number as the previous month.

- The Republican Party's 1996 platform calls for drug testing as a "routine feature of the criminal justice process at every stage, including the juvenile justice system." Results of these tests, the party said in its platform adopted last week, "should be used in deciding pretrial release, sentencing, and probation revocation." The Republicans also charged President Clinton with having "surrendered in the war on drugs," at a time when the use of marijuana, cocaine, and methamphetamines "dramatically increased." □

Pre-Employment Testing Okayed For Louisiana School District

A Louisiana judge held May 13 that a local board of education can reinstate its pre-employment drug testing program in the district, but that his earlier ruling enjoining other drug testing for current employees would stand.

Judge Alonzo Harris of Louisiana's 27th Judicial District Court had on March 29 struck down the testing policy St. Landry Parish public school district's board of education had adopted in 1994. That policy included random, reasonable suspicion, and post-accident testing for all full-time district employees, as well as pre-employment testing.

Following oral arguments April 26, Judge Harris reversed the prohibition of pre-employment tests, although he did not explain why in his two-page opinion.

Michael J. Juneau, who represented the school board, told *Drug Detection Report* that during oral arguments the board said that testing of job applicants represented less of an invasion of privacy than did the testing of current employees. □

Laboratory Specialists Reports Quarterly \$1.9-Million Revenues

Laboratory Specialists of America, Inc. (LSAI), an Oklahoma-based drug testing company, reported revenues totaling \$1,948,536 for the three months ended March 31, according to documents filed last month with the Securities and Exchange Commission. That compares with revenues totaling \$1,657,932 for the same period in 1995.

"The increase in revenues was due to a 25-percent increase in the number of specimens analyzed during the 1996 Interim Period [the three months ended March 31, 1996] as compared to the 1995 Interim Period, although partially offset by a decrease of 3.5 percent in the average price per specimen," LSAI said.

The company said the increase in the number of specimens analyzed was due to the company acquiring National Psychopharmacology Laboratory (NPL) — a drug testing lab in Knoxville, Tenn. — early this year, as well as getting new clients through Laboratory Specialists, Inc. (LSI), a lab the company already owned, in suburban New Orleans. The forensic drug testing functions of NPL now have been con-

solidated into the operations of LSI.

The company also said that its sales are affected by seasonal trends that affect drug testing laboratories.

"In LSI's experience, testing volume tends to be higher in the second calendar quarter and lower in the winter holiday season and the beginning of the first calendar quarter primarily due to hiring patterns which affect pre-employment drug testing," the company reported.

"Because the general and administrative expenses associated with maintaining and adding to the testing work force are relatively fixed over the short term, margins tend to increase in periods of higher testing volume and decrease in periods of lower testing volume. These effects are not always apparent because of the impact and timing of the startup of new businesses and other factors such as the timing and amount of price increases or decreases. Nevertheless, the results of operations for a particular quarter may not be indicative of the results to be expected during other quarters."

LSAI reported a net income of \$202,246 for the first quarter of 1996 compared with \$162,089 for the comparable period in 1995. LSAI reported revenues of \$6,925,716 for the fiscal year ended Dec. 31, 1995. The acquisition of NPL is expected to approximately double the company's revenue, company officials have said. □

Correction

• The domestic clientele of DataMed International of Lakewood, Colo., totals more than 6,000 clients, according to a DataMed official. In an article in the June 5 issue, *Drug Detection Report* said the firm, formerly known as National MRO, a third party administrator of drug and alcohol testing programs, had 200 to 300 clients. That number, says Ben Budraitis, DataMed's director of sales and marketing, represents the number of the firm's international clients in some 50 foreign countries. □

Briefly...

• During May, no labs were added to or removed from the list of labs certified by the Substance Abuse and Mental Health Services Administration to engage in urine drug testing for federal agencies. There are 73 labs on the list, which was published in the June 4 issue of the *Federal Register*. □



File

EXHIBIT 8
DATE 2/6/97
HB 345

February 5, 1997
Group

Wade Johnson
Vice-President
Conoco Refinery

OCAW Local 2-470
1268 Patriot Street
Billings, MT. 59105
406-248-4421

Honorable Bruce Simon
Chairman: House Business and Labor Committee

**Regarding:
HB-345
Private Workforce Drug and Alcohol Testing Act**

Dear Representative Simon,

We are unable to have a member of our Conoco Group come to Helena to testify against this Bill. Accordingly, we are providing you with this fax, noting our strong opposition to any Random Drug Testing, to present to the entire Committee.

I am writing not only on behalf of Conoco Group President John Cochran, but the 186 members of Local 2-470, Conoco Group.

We believe that Montana already has an excellent law in regard to drug testing which provides a means for testing those believed to be using Drugs or Alcohol while protecting the legitimate privacy concerns of Montana Citizens against obtrusive Random Testing.

Working in an Oil Refinery, we are no strangers to the hazards involved with working in an environment which could best be described as volatile. I can assure you that we all agree Drugs and Alcohol have no place on the job in our industry. However, there is no evidence or statistics to support a radical change in the current law to include Random Testing. If amendments to the current statute are needed to clarify a Hazardous Working Environment, we are sure it can be accommodated.

Our opposition to the Random Drug Testing Bill during the 1991 Legislative session has only strengthened in the ensuing years with the strong evidence that the current law is working very well without the obtrusive invasion of privacy imposed on Montana Citizens by Random Drug Testing.

Thank You,
Wade Johnson



OCAW

OIL, CHEMICAL & ATOMIC WORKERS INTL UNION, AFL-CIO

EXHIBIT 9
DATE 2/6/97
HB 345

Feb. 5, 1997

PIONEER LOCAL NO. 2-443
P.O. Box 337
LAUREL MONTANA 59044

WILLIS E. (GARY)
VANDYKE
PRESIDENT

5026 ENCAMPMENT TRAIL
ACTON, MONTANA 59002
(406) 636-1441

KIM FOLEY
RECORDING SECRETARY
P.O. Box 337
LAUREL, MONTANA 59044

TIM GUENTHER
FINANCIAL SECRETARY
P.O. Box 337
Laurel, Montana 59044

Mr. Bruce Simon
Chair Business and Labor Committee
Room 104
Helena, Montana 59620

Dear Mr. Simon,

I am writing on behalf of OCAW 2-443 Laurel, Montana and all of organized labor. We want you to know that labor is not opposed to defining "Hazardous work Environments" nor are we opposed to "Drug Free Workplaces", however we are opposed to wholesale random drug testing. Most Labor organizations have negotiated fair and reasonable drug policies with their employers which include testing with reasonable cause. It is demeaning to the worker to be treated with so little respect as to have to submit to testing just because his name was chosen on a given day. It is because of this reasoning that we would ask that you would not support H.B. 345. Thank you for your support on this matter.

Sincerely,

Willis E. Van Dyke

Willis E. Van Dyke
President OCAW 2-443
Laurel, Montana 59044



EXHIBIT 10
DATE 2/6/97
HB 345

P.O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086 • FAX (406) 248-7763

February 6, 1997

Mr. Chairman, members of the Committee:

For the record, my name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, here today to speak against HB 345. We are a membership based organization of some 800 households across the state, with the mission of defending the Constitution and the Bill of Rights of both the United States and Montana.

Montana is unique in many ways, and we are set apart from other states. As the preamble to our Montana Constitution states: We are grateful for "the quiet beauty of our state, the grandeur of our mountains, the vastness of our plains, and desiring to improve the quality of life, equality of opportunity and *to secure the blessings of liberty for this and future generations* do ordain and establish this constitution." (Emphasis added)

And what sets us further apart from other states, in Article II's Declaration of Rights, are a number of enumerated rights, none of which is more important than Section 10: the Right to Privacy. *The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.*

Before I came to work for ACLU/MT eight years ago, Montana had already carved out a sane and sensible response to workplace drug testing through a nearly unanimous bi-partisan solution that balanced privacy rights of individual workers on one hand with legitimate public safety, security and fiduciary interests of employers on the other.

Since then, there have been several attempts to upset that balance. Some attempts have catered to out of state corporations that are not obliged to respect privacy rights in other states in the same way that they must be regarded here in Montana. Other attempts were voiced by in state employers who want more control over the people they employ.

Gratefully, other years, the wisdom of this body has been to maintain the balance, to preserve the presumption of innocence until otherwise given reasonable cause for workplace drug testing, and to resist the temptation to erode workers privacy for some expensive and spurious sense of security from having workers urinate into cups.

To paraphrase Thomas Jefferson, "Show me a nation that is willing to sacrifice a little liberty for a little security, and I'll show you a nation that deserves neither and that will relinquish both"

My main point is this: if you upset the existing balance that exists in current statute, a couple of things might happen. First, an employer would no longer has to have cause for testing, and the door to random testing would be flung open wide. The issue of impairment on the job would not be in any way better addressed than under current law. But, I think a reasonable person can see that the over breadth of the new law might well invite the bringing of legal action by some employee who feels workplace testing violates their constitutional rights under Montana's right to privacy provision. Perhaps that issue should be brought before our state supreme court to determine whether an employer has the right to be in charge of more than a employee's working life. . If a worker is impaired, exisisting law allows for testing, as it should. Recreational drugs or alcohol consumed on one's own time should be one's own business.

To close, the proponents have not convinced me that there is a compelling state interest for more intrusive and open ended expansion of workplace drug testing. I hope you weigh these arguments in your considerations today and come to the conclusion that the existing law is a well crafted balance that serves Montana's needs while protecting all of our rights. I urge you to reject HB 345.

Thank you for your time and consideration.

MONTANA HOUSE OF REPRESENTATIVES VISITORS REGISTER

DATE 2-6-97

BILL NO. HB 345

SPONSOR(S) _____

TYPE
PROPONENT (P) OPPONENT (O) INFORMATIONAL (I)

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PLEASE
CIRCLE

	NAME	ADDRESS	REPRESENTING
POI	Nan Edwards	1305 21635 Billings 59104	OCAW 74
POI	John F. Eisenbraun	#2 Aspenway Park City, UT	OCAW
POI	Ed Lopez	1330 LONESOME AVE BILLINGS	O. C. A. W.
POI	DAVID PISAURO	1139 DENWAY PLACE BILLINGS MT.	OCAW
POI	Steve Turkiewicz SB 152	501 N. SANDERS	Mr. Auto Dealers Assn
POI	Dave Brown SB 152	3040 OXANA Butte	MT. Independent Auto Dealers Assn
POI	Russell M. Donald	2701 PROSPECT HELENA 59620	MT DEPT OF TRANS.
POI	Wend. Davala	Stillwater Mine (Helena)	
POI	Terry Minow		MT Fed of Health Care Employees
POI	Steve Browning	343 Clarke St	Self
POI	Bob Thompson	426 S. 1st St	
POI	John Brown	1206 E. 1st St	5
POI	Jim Dornell	Building B Bce	Building trades
POI	Keith Johnson	306 W MERCURY Butte	Medical Research and private enterprises

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

C George Hagerman

Helena

AFSCME

MONTANA HOUSE OF REPRESENTATIVES VISITORS REGISTER

DATE 2-6-97

BILL NO. HB-345

SPONSOR(S) _____

TYPE
PROPONENT (P) OPPONENT (O) INFORMATIONAL (I)

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NAME

ADDRESS

REPRESENTING

POI	Charles R. Brooks	Billings	Billings Chamber
POI	George Hagerman	Helena	AFSCME
POI	Bert Howard	Helena	MT Motor Carrier Assn
POI	Gordon Allen	Helena	MT Wood Products Assn
POI	Jim M. ANDERSON	BILLINGS	MT Chemnet Consortium
POI	Wayne Hall	Billings	JTL Group, Inc.
POI	Carl Schweitzer	MT Coal Assn	Helena
POI	Michael Bentley	Box 5356 Helena	AFSCME
POI			
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PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS & LABOR

Call to Order: By **CHAIRMAN BRUCE SIMON**, on February 17, 1997, at 8:00 AM, in Room 312-2.

ROLL CALL

Members Present:

Rep. Bruce T. Simon, Chairman (R)
Rep. Paul Sliter, Vice Chairman (Majority) (R)
Rep. Robert J. "Bob" Pavlovich, Vice Chairman (Minority) (D)
Rep. Joe Barnett (R)
Rep. Rod Bitney (R)
Rep. Sylvia Bookout-Reinicke (R)
Rep. Charles R. Devaney (R)
Rep. David Ewer (D)
Rep. Kim Gillan (D)
Rep. Billie Krenzler (D)
Rep. Bob Lawson (R)
Rep. Rod Marshall (R)
Rep. Gay Ann Masolo (R)
Rep. Wes Prouse (R)
Rep. Carolyn M. Squires (D)
Rep. Jay Stovall (R)
Rep. Cliff Trexler (R)
Rep. Joe Tropila (D)
Rep. Carley Tuss (D)

Members Excused: None

Members Absent: None

Staff Present: Stephen Maly, Legislative Services Division
Pati O'Reilly, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 535; HB 442; HB 533; HB 532; (2/12/97)

Executive Action: HB 535; HB 345

EXECUTIVE ACTION ON HB 535

Motion: Rep. Barnett moved do pass HB 535.

{Tape: 3; Side: 1; Approx. Time Count: 18.5; Comments: None.}

Discussion: {Tape: 3; Side: 1; Approx. Time Count: 19.2;
Comments: None.}

Vote: Motion failed roll call 5-14.

{Tape: 3; Side: 1; Approx. Time Count: 20.0; Comments: None.}

Motion/Vote: Rep. Pavlovich moved to table HB 535. Motion carried by reversing the vote. 14-5.

{Tape: 3; Side: 1; Approx. Time Count: 22.8; Comments: None.}

EXECUTIVE ACTION ON HB 345

Motion: Rep. Stovall moved do pass HB 345. EXHIBIT 16.

{Tape: 3; Side: 1; Approx. Time Count: 24.9; Comments: None.}

Motion: Rep. Stovall moved to adopt Masolo amendments. EXHIBIT 17.

{Tape: 3; Side: 1; Approx. Time Count: 26.1; Comments: None.}

Discussion: {Tape: 3; Side: 1; Approx. Time Count: 26.2;
Comments: None.}

Vote: Motion on Masolo amendments passed roll call 11-7.

{Tape: 3; Side: 2; Approx. Time Count: 1.2; Comments: None.}

Motion: Rep. Masolo moved do pass HB 345 as amended.

{Tape: 3; Side: 2; Approx. Time Count: 7.5; Comments: None.}

Motion: Rep. Gillan moved to adopt Gillan amendment.

{Tape: 3; Side: 2; Approx. Time Count: 8.0; Comments: None.}

Discussion:

{Tape: 3; Side: 2; Approx. Time Count: 8.1; Comments: None.}

Motion: Rep. Gillan withdrew Gillan motion.

{Tape: 3; Side: 2; Approx. Time Count: 14.3; Comments: None.}

Vote: Motion for do pass as amended passed roll call 12-6.

{Tape: 3; Side: 2; Approx. Time Count: 14.5; Comments: None.}

This is not an official bill.

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EXHIBIT 16
DATE 2/17/97
HB 345

HOUSE BILL NO. 345

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL TESTING PROGRAMS; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 5] may be cited as the "~~Private~~ Workforce Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 5], the following definitions apply:

[1] "~~Alcohol~~" means an intoxicating agent in alcoholic beverage, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

[2] "~~Alcohol Concentration~~" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test.

(1) "Controlled substance" means a dangerous drug, as defined in 49 CFR part 40 as 50-32-101, and listed in Schedules I or II in 50-32-222 and 50-32-224, except a drug used pursuant to a valid prescription or as authorized by law.

(2) "Employee" means an individual engaged in the performance of work for ~~a private~~ an employer, and does not include an independent contractor.

(3) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees and that is located in or doing business in Montana.

(4) "Medical review officer" means a ~~state~~ licensed physician trained in the field of substance abuse.

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(5) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

(6) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in [sections 4 and 5]

(7) "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled substance or a breath alcohol test to determine the presence of alcohol.

NEW SECTION. Section 3. Limitations on employer liability. (1) An employer is not liable for monetary damages arising out of a drug or alcohol test that the employer requires an employee or prospective employee to take if the test is administered pursuant to a qualified testing program that is adopted and implemented by an employer to test employees for the presence of controlled substances or alcohol, unless:

(a) the employer took disciplinary action against the employee based on a false test result and the employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable presumption that an employer's reliance on a test result is reasonable if the employer complies with the provisions of [sections 4 ~~through 8 and 5~~] and rules adopted pursuant to [sections 4 ~~through 8 and 5~~].

(b) the employer committed defamation of character, libel, slander, or damage to reputation, as established by statute or common law, by knowingly disclosing false test results with malice.

(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical abnormality, problem, or defect of any kind.

NEW SECTION. Section 4. Qualified testing program. A qualified testing program must comply with the following criteria:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees and prospective employees 60 days before implementation. Controlled substance and alcohol testing procedure must conform to 49 CFR, part 40. At a minimum, the policies and procedures must require:

(a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;

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(b) the employer's proposal for educating or providing information to employees on the health risks associated with the use of controlled substances and alcohol;

(c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;

(d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;

(e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;

(f) a statement that employees may be tested, including a description ~~discussion~~ of the circumstances that may trigger an immediate test;

(g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) employees or agents of the employer who are specifically authorized by the tested employee to ~~resolve~~ receive the employee's test results; or

(iii) ~~in a proceeding related to a legal action in connection with any legal or administrative claim~~ arising out of the employer's implementation of [sections 1 through 5-8] or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards

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1 of conduct, an employer may require an employee who tests positive on a test for controlled substances or
2 alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a
3 condition of continued employment. An employer may require the employee to submit to periodic follow up
4 testing ~~retesting~~ as a condition of the counseling, treatment, or rehabilitation program.

5 (3) Testing must be at the employer's expense, and all employees must be compensated at the
6 employee's regular rate, including benefits, for time attributable to the testing program.

7 (4) The collection transport and testing of urine samples must be performed in accordance with 49 CFR
8 part 40, a manner designed to protect the privacy of the employee, using, when practicable, screens or stalls,
9 ~~except that if an employer has reason to believe an employee may adulterate or substitute the required~~
10 ~~sample, the employer may require that the sample be provided under the direct supervision of testing~~
11 ~~personnel.~~

12 ~~—(5) Samples must be handled under strict forensic chain-of-custody procedures. The procedures must~~
13 ~~require that a sample be collected, stored, and transported in a manner that documents and preserves the~~
14 ~~identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
15 ~~results.~~

16 ~~—(6) Testing of samples must be performed according to scientifically accepted analytical procedures by a~~
17 ~~qualified laboratory certified by the federal department of health and human services national institute on drug~~
18 ~~abuse. Confirmatory tests of an initial screening test must be conducted by the same laboratory using gas~~
19 ~~chromatography mass spectrometry techniques or techniques that are of comparable or superior quality with~~
20 ~~respect to validation.~~

21 (7) Before an employer may take any action based on a positive test result, the employer shall have the
22 results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An
23 employee or prospective employee must be given the opportunity to provide notification to the medical
24 review officer of any medical information that is relevant to interpreting test results, including information
25 concerning currently or recently used prescription or nonprescription drugs.

26 [8] Breath alcohol tests must be administered by a certified breath alcohol technician and may only be
27 conducted using testing equipment that appears on the list of conforming products published in the federal
28 register.

29 [9] A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 percent for a

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1 person to be considered having alcohol in the person's body.

2 NEW SECTION. Section 5. Each of the following activities is permissible in the implementation of a
3 qualified testing program:

4 (1.) An employer may test newly hired employees within 5 days of reporting to work.

5 (2.) An employer may use random testing if the employer's controlled substance and alcohol policy
6 includes one or both of the procedures described in subsections (a) and (b).

7 a. The employer or an employer's representative may establish a date when all salaried and wage-
8 earning employees at a worksite will be required to undergo controlled substance or alcohol tests or both.

9 b. The employer may manage or contract with a third party to establish and administer a random testing
10 process that must include:

11 (i) an established calendar period for testing

12 (ii) an established testing rate within the calendar period

13 (iii) a random selection process that will determine who will be tested on any given date during
14 the calendar period for testing:

15 (iv) all supervisory and managerial employees in the random selection process; and

16 (v) a procedure that requires the employer to obtain a signed statement from each employee that
17 confirms that the employee has received a written description of the random selection process and that
18 requires the employer to maintain the statement in the employee's personnel file. The selection of employees
19 in a random testing procedure must be made by a scientifically valid method, such as a random number table or
20 a computer-based random number generator table.

21 3. An employer may require an employee to submit to followup tests if the employer determines that the
22 employee has misused controlled substances or alcohol at the work site. The followup tests must be
23 described in the employer's controlled substance and alcohol policy and may be conducted for up to one year
24 from the time the employer first requires a followup test.

25 4. An employer may require an employee to be tested for controlled substances or alcohol if the
26 employer has reason to suspect that an employee's faculties are impaired on the job as a result of alcohol
27 consumption or the use of a controlled substance. An employer shall comply with supervisory training
28 requirement in 49 CFR part 382.603 whenever the employer requires a test on the basis of reasonable
29 suspicion.

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1 5. An employer may require an employee to be tested for controlled substances or alcohol if the
2 employer has reason to believe the employee may have contributed to a work-related accident that has
3 caused death or personal injury or property damage in excess of \$1,500.

4
5 NEW SECTION. Section 6. EMPLOYEE'S RIGHT OF REBUTTAL. The employer shall provide an
6 employee who has been tested under any qualified testing program described in [section 5] with a copy of the
7 test report. The employer is also required to obtain, at the employee's request and at the employee's
8 expense, an additional test of the urine split sample by an independent laboratory selected by the person
9 tested. The employee must be provided the opportunity to rebut or explain the results of any tests.

10 NEW SECTION. Section 7. LIMITATION OF ADVERSE ACTION. Adverse action may not be taken by
11 the employer if the employee presents a reasonable explanation or medical opinion indicating that the original
12 test results were not caused by alcohol consumption or illegal use of controlled substances. If the employee
13 presents a reasonable explanation or medical opinion, the test results must be removed from the employee's
14 record and destroyed.

15
16 NEW SECTION. Section 8. Confidentiality of results. (1) Except as provided in subsection (2)
17 and except for information that is required by law to be reported to a state or federal licensing authority, all
18 information, interviews, reports, statements, memoranda, or test results received by an employer through a
19 qualified testing program are confidential communications and may not be used or received in evidence,
20 obtained in discovery, or disclosed in any public or private proceeding.

21 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

22 (a) legal action arising out of an employer's implementation of [sections 1 through 8]; or

23 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess
24 of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the
25 accident.

26
27 Section 9. Section 39-2-304, MCA, is amended to read:

28 "39-2-304. Lie detector tests prohibited ~~—regulation of blood and urine testing.~~ (1) A
29 person, firm, corporation, or other business entity or its representative may not require

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from the actual amended bill.**

1 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test or any~~
2 ~~form of a mechanical lie detector test; as a condition for employment or continuation of employment.~~

3 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for employment in:~~

4 ~~—(i) hazardous work environments;~~

5 ~~—(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

6 ~~—(iii) jobs involving the intrastate commercial transportation of persons or commodities by a commercial~~
7 ~~motor carrier or an employee subject to driver qualification requirements; and~~

8 ~~—(c) as a condition for continuation of employment, an employee to submit to a blood or urine test, except~~
9 ~~when:~~

10 ~~—(i) the employer has reason to believe that the employee's faculties are impaired on the job as a result of~~
11 ~~alcohol consumption or illegal controlled substance use;~~

12 ~~—(ii) the employer has reason to believe that an employee may have contributed to a work-related accident~~
13 ~~that causes death or personal injury or property damage in excess of \$1,500; or~~

14 ~~—(iii) controlled substance testing is being conducted at an employee's regular biennial physical for~~
15 ~~employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

16 ~~—(2) Prior to the administration of a controlled substance or alcohol test, the person, firm, corporation, or~~
17 ~~other business entity or its representative shall adopt the written testing procedure that is provided in 40 CFR,~~
18 ~~part 40, and make it available to all persons subject to testing.~~

19 ~~—(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of~~
20 ~~controlled substance or alcohol test results to the person tested and provide the person with the opportunity,~~
21 ~~at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
22 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
23 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
24 ~~(1)(c)(ii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
25 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
26 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of~~
27 ~~the finding. The written record of a blood or urine test of an employee who is required to submit to testing~~
28 ~~pursuant to subsection (1)(c)(ii) and whose acts or failure to act is subsequently found not to be the direct or~~
29 ~~proximate cause of a work-related accident must be removed from the employee's work record and be~~

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1 ~~destroyed.~~

2 ~~—(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if~~
3 ~~the person tested presents a reasonable explanation or medical opinion indicating that the results of the test~~
4 ~~were not caused by alcohol consumption or illegal drug use.~~

5 ~~—(5) A person who violates this section is guilty of a misdemeanor.~~

6 ~~—(6) As used in this section:~~

7 ~~—(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 60-12-101; and~~

8 ~~—(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this state."~~

9

10 **NEW SECTION.** Section 10. Codification Instruction. [Sections 1 through 8] are intended to be
11 codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2, apply
12 to [sections 1 through 5].

13

14 **NEW SECTION.** Section 11. **SEVERABILITY.** If a part of [this Act] is invalid, all valid parts that are
15 severable from the invalid part remain in effect. If a part of [this Act] is invalid in one or more of its applications,
16 the part remains in effect in all valid applications that are severable from the invalid applications

17

-END-

42

Amendments to House Bill No. 345
First Reading Copy

Requested by Rep. Masolo
For the Committee on Business and Labor

Prepared by Stephen Maly
February 14, 1997

EXHIBIT 17
DATE 2/17/97
HB 345

1. Title, line 4.
Strike: "PRIVATE"

2. Page 1, lines 12 and 15.
Strike: "5"
Insert: "8"

3. Page 1, line 12.
Strike: ""Private Workforce"
Insert: ""Workforce"

4. Page 1.
Following: line 16
Insert: "(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.
(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test."
Renummer: subsequent subsections

5. Page 1, lines 17 and 18.
Following: "defined"
Strike: the remainder of line 17 through "50-32-224" on page 18
Insert: "in 49 CFR, part 40"

6. Page 1, line 20.
Strike: "a private"
Insert: "an"

7. Page 1, line 22.
Strike: "in the private sector"

8. Page 1, line 24.
Strike: "state-licensed"
Insert: "licensed"

9. Page 1, line 30.
Strike: "or blood"

10. Page 2, line 11.
Strike: "and 5" in two places
Insert: "through 8" in both places

11. Page 2, line 22.
Following: "before"
Strike: "implementation."
Insert: "the terms are implemented or changed. Controlled
substance and alcohol testing procedures must conform to 49
CFR, part 40."

12. Page 3, line 4.
Strike: "discussion"
Insert: "description"

13. Page 3, line 6.
Following: "test"
Insert: "and a stated alcohol concentration level above which a
tested employee must be sanctioned"

14. Page 3, line 15.
Strike: "resolve"
Insert: "receive"

15. Page 3, line 16.
Following: "(iii)"
Strike: "in a proceeding related to a legal action"
Insert: "in connection with any legal or administrative claim"

16. Page 3, line 17.
Strike: "5"
Insert: "8"

17. Page 3, line 27.
Strike: "retesting"
Insert: "followup testing"

18. Page 3, line 30.
Following: "collection"
Strike: "of"
Insert: ", transport, and testing of urine"

19. Page 3, line 30 through page 4, line 11.

Following: "in" on page 3, line 30

Strike: the remainder of line 30 through "validation" on page 4, line 11

Insert: "accordance with 49 CFR, part 40"

Renumber: subsequent subsection

20. Page 4, line 17.

Insert: "(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be conducted using testing equipment that appears on the list of conforming products published in the Federal Register.

(7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person to be considered as having alcohol in the person's body.

NEW SECTION. **Section 5. Qualified testing program -- allowable types -- procedures.** Each of the following activities is permissible in the implementation of a qualified testing program:

(1) An employer may test any newly hired employee within 5 days of the employee's reporting to work.

(2) An employer may use random testing if the employer's controlled substance and alcohol policy includes one or both of the following procedures:

(a) An employer or an employer's representative may establish a date when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.

(b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:

(i) an established calendar period for testing;
(ii) an established testing rate within the calendar period;
(iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;

(iv) all supervisory and managerial employees in the random selection process; and

(v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.

(3) An employer may require an employee to submit to followup tests if the employer determines that the employee has misused controlled substances or alcohol at the work site. The followup tests must be described in the employer's controlled substance and alcohol policy and may be conducted

for up to 1 year from the time that the employer first requires a followup test.

(4) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with supervisory training requirement in 49 CFR, part 382.603, whenever the employer requires a test on the basis of reasonable suspicion.

(5) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee may have contributed to a work-related accident that has caused death or personal injury or property damage in excess of \$1,500.

NEW SECTION. Section 6. Employee's right of rebuttal. The employer shall provide an employee who has been tested under any qualified testing program described in [section 5] with a copy of the test report. The employer is also required to obtain, at the employee's request and at the employee's expense, an additional test of the urine split sample by an independent laboratory selected by the person tested. The employee must be provided the opportunity to rebut or explain the results of any test.

NEW SECTION. Section 7. Limitation on adverse action. Adverse action may not be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed."

21. Page 4, line 24.

Strike: "5"

Insert: "8"

22. Page 6, lines 12 and 14.

Strike: "5"

Insert: "8"

23. Page 6, following line 14.

Insert: "NEW SECTION. Section 11. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

BUSINESS AND LABOR COMMITTEE

DATE 7/17/97 BILL NO. 345 NUMBER _____MOTION: Rep Stovall to adopt Amendment
to RB 345

11-7

NAME	AYE	NO
Bruce Simon, Chairman	X	
Paul Sliter, Vice Chairman	X	
Bob Pavlovich, Vice Chairman		X
Joe Barnett	X	
Rod Bitney	X	
Sylvia Bookout	X	
Charles Devaney	X	
David Ewer		X
Kim Gillan	X	
Billie Krenzler		X
Bob Lawson	X	
Rod Marshall	X	
Gay Ann Masolo	X	
Wes Prouse	X	
Carolyn Squires		X
Jay Stovall	X	
Cliff Trexler		X
Joe Troplia		X
Carley Tuss		X

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

BUSINESS AND LABOR COMMITTEE

DATE 2/17/97 BILL NO. 345 NUMBER _____MOTION: Rep Marsh motion to Pass HB
345 as amended

12-6

NAME	AYE	NO
Bruce Simon, Chairman	X	
Paul Sliter, Vice Chairman	X	
Bob Pavlovich, Vice Chairman		X
Joe Barnett	X	
Rod Bitney	X	
Sylvia Bookout		
Charles Devaney	X	
David Ewer		X
Kim Gillan	X	
Billie Krenzler		X
Bob Lawson	X	
Rod Marshall	X	
Gay Ann Masolo	X	
Wes Prouse	X	
Carolyn Squires		X
Jay Stovall	X	
Cliff Trexler	X	
Joe Troplia		X
Carley Tuss		X



COMMITTEE ABSENTEE BALLOT

Date: 2-17-97

I hereby authorize Rep. Sliter

to cast my vote(s) as follows:

HB 535 - aye

HB 345 yes - amendments
yes - Do Pass

MARSHALL

Representative R. Marshall

2nd Reading Committee of which

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Total 0

Absent or not voting: Feland.

Total 1

SB 1 - Representative Knox moved SB 1 be concurred in. Motion carried as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bookout, Brainard, Clark, Cocchiarella, Curtiss, DeBruycker, Ellis, Feland, Gillan, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Heavy Runner, Hibbard, Holland, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Lawson, Marshall, Masolo, McCann, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Pavlovich, Prouse, Quilici, Ream, Rehbein, Rose, Ryan, Simon, Simpkins, Sliter, Smith, Soft, Story, Stovall, Tash, Taylor, Trexler, Wagner, Walters, Wells, Wiseman, Zook, Mr. Speaker.

Total 68

Noes: Barnhart, Bohlinger, Carey, Cobb, Denny, Dowell, Ellingson, Ewer, Galvin, Grady, Hagener, Harper, Harrington, Hurdle, J. Johnson, Kottel, Krenzler, McCulloch, Pease, Peck, Raney, Sands, Schmidt, Simpson, Squires, Swanson, Tropila, Tuss, Vick, Whitehead, Wyatt.

Total 31

Voted Absentee: Harrington, No.

Excused: Devaney.

Total 1

Absent or not voting: None.

Total 0

HB 345 - Representative Masolo moved HB 345 do pass.

Representative Masolo moved HB 345, second reading copy, be amended as follows (amendment #1):

1. Title, lines 6 and 7.

Following: ";" on line 6

Strike: remainder of line 6 through ";" on line 7

2. Page 1, line 12.

Strike: "8"

Insert: "7"

3. Page 1, line 15.

Strike: "8"

Insert: "7"

4. Page 1, line 24.

Following: "work"

Insert: "in a hazardous work environment, security position, position affecting public safety, or fiduciary position"

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5. Page 1, line 28.

Following: line 27

Insert: "(6) "Hazardous work environment" includes but is not limited to positions:

- (a) for which drug and alcohol testing is mandated by federal law, such as aviation, interstate motor carrier, railroad, pipeline, and commercial marine employees;
- (b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or
- (c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances."

Renumber: subsequent subsections

6. Page 2, line 3.

Strike: "4"

Insert: "3"

Strike: "5"

Insert: "4"

7. Page 2, lines 7 through 21.

Strike: section 3 in its entirety

Renumber: subsequent sections

8. Page 3, line 25.

Strike: "8"

Insert: "7"

9. Page 4, line 10.

Following: "performed"

Insert: "in"

10. Page 5, lines 8 and 9.

Strike: "NEWLY HIRED" on line 8

Insert: "prospective"

Following: "EMPLOYEE" on line 8

Strike: remainder of line 8 through "WORK" on line 9

11. Page 6, line 17.

Strike: "5"

Insert: "4"

12. Page 7, line 5.

Strike: "8"

Insert: "7"

13. Page 8, line 23.

Strike: "8"

Insert: "7"

14. Page 8, line 25.

Strike: "8"

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Insert: "7"

Amendment #1 passed as follows:

Ayes: Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Bohlinger, Bookout, Carey, Clark, Cobb, Cocchiarella, Curtiss, Denny, Dowell, Ellingson, Ellis, Ewer, Gillan, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, Kasten, Kitzenberg, Knox, Kottel, Krenzler, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Raney, Ream, Rehbein, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Sliter, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Wagner, Walters, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.

Total 82

Noes: Adams, Boharski, Brainard, DeBruycker, Galvin, Grimes, R. Johnson, Jore, Keenan, Lawson, Molnar, Tuss, Wells.

Total 13

Excused: Devaney, Harrington.

Total 2

Absent or not voting: Feland, Grady, Vick.

Total 3

Representative Tuss moved HB 345, second reading copy, be further amended as follows (amendment #2):

1. Page 1, line 25.

Following: "."

Insert: "The term includes an elected official."

Amendment #2 passed as follows:

Ayes: Ahner, Barnett, Barnhart, Beaudry, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Carey, Cobb, Cocchiarella, Curtiss, DeBruycker, Denny, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grinde, Hagener, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Knox, Kottel, Krenzler, Lawson, McCann, McCulloch, Menahan, Molnar, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Ream, Ryan, Sands, Schmidt, Simon, Simpson, Sliter, Soft, Squires, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Wagner, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.

Total 71

Noes: Adams, Bankhead, Bergman, Brainard, Clark, Grimes, H.S. Hanson, M. Hanson, Harper, Hayne, Heavy Runner, Marshall, Masolo, McGee, Raney, Rehbein, Rose, Simpkins, Smith, Story, Stovall, Walters, Wells.

Total 23

Excused: Devaney, Harrington.

Total 2

Absent or not voting: Anderson, Arnott, Kitzenberg, Mills.

Total 4

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Representative Squires moved HB 345, second reading copy, be further amended as follows (amendment #3):

1. Page 5, line 21.
Following: "SELECTION"
Insert: "and testing"

Amendment #3 passed as follows:

Ayes: Adams, Ahner, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bitney, Bohlinger, Bookout, Carey, Cobb, Cocchiarella, Curtiss, DeBruycker, Denny, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kasten, Kitzenberg, Knox, Kottel, Krenzler, Lawson, Masolo, McCann, McCulloch, McGee, Menahan, Molnar, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Raney, Ream, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Sliter, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Wagner, Walters, Wells, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 87

Noes: Bergsagel, Boharski, Brainard, Clark, Hayne, Jore, Keenan, Rehbein.
Total 8

Excused: Devaney, Harrington.
Total 2

Absent or not voting: Anderson, Marshall, Mills.
Total 3

Representative Tuss moved HB 345, second reading copy, be further amended (amendment #4). Motion failed as follows: (37-61)

Representative Clark moved for cloture. Motion carried.

Motion that HB 345 do pass, as amended, carried as follows:

Ayes: Ahner, Anderson, Bankhead, Barnett, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Clark, Cobb, Denny, Ellis, Gillan, Grimes, H.S. Hanson, M. Hanson, Hayne, Hibbard, Holland, J. Johnson, R. Johnson, Kitzenberg, Knox, Kottel, Lawson, Marshall, Masolo, Mills, Molnar, Mood, Ohs, Peck, Prouse, Rose, Simon, Simpkins, Sliter, Smith, Soft, Stovall, Tash, Taylor, Vick, Walters, Wiseman, Zook, Mr. Speaker.
Total 50

Noes: Adams, Arnott, Barnhart, Brainard, Carey, Cocchiarella, Curtiss, DeBruycker, Dowell, Ellingson, Ewer, Feland, Galvin, Grady, Grinde, Hagener, Harper, Harrington, Heavy Runner, Hurdle, Jore, Kasten, Keenan, Krenzler, McCulloch, McGee, Menahan, Orr, Pavlovich, Pease, Quilici, Raney, Ream, Rehbein, Ryan, Sands, Schmidt, Simpson, Squires, Story, Swanson, Trexler, Tropila, Tuss, Wagner, Wells, Whitehead, Wyatt.
Total 48

Voted Absentee: Harrington, No.

Excused: Devaney.
Total 1

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Absent or not voting: McCann.
Total 1

HB 517 - Representative Vick moved HB 517 do pass.

Representative Vick moved HB 517, second reading copy, be amended as follows (amendment #1):

1. Title, line 12.
Strike: "A SHAREHOLDER,"
Insert: "AN"
Following: "EMPLOYEE"
Strike: ", "

2. Title, lines 13 and 16.
Strike: "SHAREHOLDER,"
Following: "EMPLOYEE"
Strike: ", "

3. Page 2, line 3.
Strike: "a shareholder,"
Insert: "an"
Following: "employee"
Strike: " , "

4. Page 2, lines 4, 7, and 9.
Strike: "shareholder,"
Following: "employee"
Strike: " , "

Amendment #1 passed as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Clark, Cobb, Curtiss, DeBruycker, Denny, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Raney, Ream, Rehbein, Rose, Ryan, Schmidt, Simon, Simpkins, Simpson, Sliter, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tuss, Vick, Wagner, Walters, Wells, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 87

Noes: Carey, Cocchiarella, Ellingson, Hagener, Harper, Hurdle, Sands, Whitehead.
Total 8

Excused: Devaney, Harrington.
Total 2

Absent or not voting: Dowell, Heavy Runner, Tropila.
Total 3

3rd Reading

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Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Brainard, Clark, Curtiss, DeBruycker, Denny, Devaney, Ellis, Feland, Grady, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Holland, R. Johnson, Jore, Kasten, Keenan, Knox, Lawson, McGee, Mills, Molnar, Orr, Prouse, Rehbein, Rose, Simon, Simpkins, Sliter, Soft, Story, Tash, Trexler, Vick, Wagner, Walters, Wells, Wiseman, Zook, Mr. Speaker.

Total 53

Noes: Barnhart, Bohlinger, Bookout, Carey, Cobb, Cocchiarella, Dowell, Ellingson, Ewer, Galvin, Gillan, Hagener, Harper, Harrington, Heavy Runner, Hibbard, Hurdle, J. Johnson, Kitzenberg, Kottel, Krenzler, Masolo, McCann, McCulloch, Menahan, Mood, Ohs, Pavlovich, Pease, Peck, Quilici, Raney, Ream, Ryan, Sands, Schmidt, Simpson, Smith, Squires, Stovall, Swanson, Taylor, Tropila, Whitehead, Wyatt.

Total 45

Excused: Marshall.

Total 1

Absent or not voting: Tuss.

Total 1

HB 306 passed as follows:

Ayes: Adams, Anderson, Arnott, Bankhead, Barnett, Beaudry, Bergsagel, Bitney, Boharski, Bookout, Brainard, Clark, Cobb, Curtiss, DeBruycker, Denny, Devaney, Ellis, Feland, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Holland, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Lawson, Marshall, Masolo, McGee, Mills, Mood, Ohs, Orr, Prouse, Rehbein, Rose, Simon, Simpkins, Sliter, Smith, Soft, Story, Stovall, Tash, Taylor, Trexler, Vick, Wagner, Walters, Wells, Wiseman, Zook, Mr. Speaker.

Total 59

Noes: Ahner, Barnhart, Bergman, Bohlinger, Carey, Cocchiarella, Dowell, Ellingson, Ewer, Galvin, Gillan, Grady, Hagener, Harper, Harrington, Heavy Runner, Hibbard, Hurdle, J. Johnson, Kottel, Krenzler, McCann, McCulloch, Menahan, Molnar, Pavlovich, Pease, Peck, Quilici, Raney, Ream, Ryan, Sands, Schmidt, Simpson, Squires, Swanson, Tropila, Tuss, Whitehead, Wyatt.

Total 41

Voted Absentee: Marshall, Aye.

Excused: None.

Total 0

Absent or not voting: None.

Total 0

HB 345 passed as follows:

Ayes: Adams, Ahner, Anderson, Bankhead, Barnett, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Clark, Cobb, Curtiss, DeBruycker, Denny, Devaney, Ellis, Grimes, H.S. Hanson, M. Hanson, Hayne, Hibbard, Holland, R. Johnson, Kasten, Kitzenberg, Knox, Lawson, Marshall, Masolo, McCann, McGee, Mills, Mood, Ohs, Peck, Prouse, Rose, Simon, Simpkins, Sliter, Smith, Soft, Stovall, Tash, Taylor, Trexler, Walters,

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Wiseman, Zook, Mr. Speaker.

Total 53

Noes: Arnott, Barnhart, Brainard, Carey, Cocchiarella, Dowell, Ellingson, Ewer, Feland, Galvin, Gillan, Grady, Grinde, Hagener, Harper, Harrington, Heavy Runner, Hurdle, J. Johnson, Jore, Keenan, Kottel, Krenzler, McCulloch, Menahan, Molnar, Orr, Pavlovich, Pease, Quilici, Raney, Ream, Rehbein, Ryan, Sands, Schmidt, Simpson, Squires, Story, Swanson, Tropila, Tuss, Vick, Wells, Whitehead, Wyatt.

Total 46

Voted Absentee: Marshall, Aye.

Excused: None.

Total 0

Absent or not voting: Wagner.

Total 1

HB 346 passed as follows:

Ayes: Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Bohlinger, Bookout, Carey, Clark, Cobb, Cocchiarella, Curtiss, DeBruycker, Denny, Devaney, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kasten, Kitzenberg, Knox, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Pavlovich, Pease, Peck, Quilici, Raney, Ream, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Sliter, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Walters, Wells, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.

Total 90

Noes: Adams, Boharski, Brainard, Jore, Keenan, Orr, Prouse, Rehbein, Smith, Wagner.

Total 10

Voted Absentee: Marshall, Aye.

Excused: None.

Total 0

Absent or not voting: None.

Total 0

HB 371 passed as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Carey, Clark, Cobb, Cocchiarella, DeBruycker, Denny, Devaney, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kasten, Keenan, Kitzenberg, Knox, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Pavlovich, Peck, Quilici, Raney, Ream, Rehbein, Ryan, Sands, Schmidt, Simon,

COMMITTEE--(S) LABOR & EMPLOYMENT RELATIONS

CHAIRMAN--TOM KEATING

SECRETARY-GILDA CLANCY/439

NORMAL SCHEDULE => SITE: ROOM 413/415

DAYS: T,TH,S

TIME: 3:00 P.M.

BILL NO--	REFERRED	HEARING	OTHER CONSIDERATION DATES	EXECUTIVE ACTION/DATE/VOTE	-----	REREFERRED	----	DATE READ
HB0101	BERGSAGEL, ERNEST		INCREASING TO \$200,000 PROJECTS THAT MAY BE CONSTRUCTED BY INMATE LABOR					
	2/04	3/06		CONCUR AS AMENDED 3/18	VOTE: 6-3			3/20
HB0115	GRIMES, DUANE		REVISE DEDUCTIONS FROM UNEMPLOYMENT BENEFITS					
	1/21	2/04		CONCUR	2/6	VOTE: 7-0		2/08
HB0150	JOHNSON, ROYAL		DECREASE % OF OLD FUND LIABILITY TAX AND REQUIRE REPAYMENT OF \$20 MILLION					
	3/28	4/08		TABLED	4/15	VOTE: 6-2		
HB0172	SOFT, LOREN		REVISE PROVISIONS ABOUT STATE EMPLOYEES AND EMPLOYMENT PRACTICES					
	1/30	2/11		CONCUR AS AMENDED 3/6	VOTE: 6-3			3/07
HB0252	MOLNAR, BRAD		REVISE CONTRACTOR AND INDEPENDENT CONTRACTOR LAWS					
	3/03	3/13	TABLED 3/20	CONCUR AS AMENDED 3/27	VOTE: 8-1			3/28
HB0341	MERCER, JOHN		OVERTIME EXEMPTION FOR CERTAIN EMPLOYEES OF PARTS STORE					
	2/11	3/11		CONCUR	3/18	VOTE: 9-0		3/20
HB0345	MASOLO, GAY ANN		ADOPTING THE WORKFORCE DRUG AND ALCOHOL TESTING ACT					
	3/03	3/11		CONCUR AS AMENDED 3/20	VOTE: 7-2			3/22
HB0367	BEAUDRY, HALEY		REVISE EXPERIENCE REQUIREMENT FOR CONSTRUCTION BLASTER					
	2/05	3/04		CONCUR	3/6	VOTE: 9-0		3/07
HB0407	EWER, DAVID		REVISE "SERVICES" FOR PREVAILING WAGE PURPOSES					
	2/19	3/04		CONCUR	3/6	VOTE: 9-0		3/07
HB0447	STOVALL, JAY		PERMIT TEMPORARY PRIVATE SECURITY GUARDS					
	3/03	3/11		CONCUR AS AMENDED 3/18	VOTE: 9-0			3/20
HB0517	VICK, STEVE		REQUIRE EMPLOYEE PERMISSION TO DIVERT WAGES/SALARY FOR POLITICAL PURPOSES					
	3/04	3/18		CONCUR AS AMENDED 3/20	VOTE: 9-0			3/22

HOUSE BILL NO. 345

INTRODUCED BY MASOLO

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL TESTING PROGRAMS;~~ PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through ~~5-8~~ 7] may be cited as the "~~Private Workforce~~ WORKFORCE Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8~~ 7], the following definitions apply: (1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

(2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL BREATH TEST.

~~(1)(3)~~ (3) "Controlled substance" means a dangerous drug, as defined as ~~50-32-101~~, and listed in Schedules I or II in ~~50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid prescription or as authorized by law.

~~(2)(4)~~ (4) "Employee" means an individual engaged in the performance of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION AFFECTING PUBLIC SAFETY, OR FIDUCIARY POSITION for a ~~private~~ AN employer and does not include an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

~~(3)(5)~~ (5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees and that is located in or doing business in Montana.

(6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:

1 (A) FOR WHICH DRUG AND ALCOHOL TESTING IS MANDATED BY FEDERAL LAW, SUCH AS
2 AVIATION, INTERSTATE MOTOR CARRIER, RAILROAD, PIPELINE, AND COMMERCIAL MARINE
3 EMPLOYEES;

4 (B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION
5 EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR

6 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
7 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

8 ~~(4)(6)(7)~~ "Medical review officer" means a ~~state-licensed~~ LICENSED physician trained in the field
9 of substance abuse.

10 ~~(5)(7)(8)~~ "Prospective employee" means an individual who has made a written or oral application
11 to an employer to become an employee.

12 ~~(6)(8)(9)~~ "Qualified testing program" means a program to test for the presence of controlled
13 substances and alcohol that meets the criteria set forth in [sections 43 and 54].

14 ~~(7)(9)(10)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled
15 substance or a breath alcohol test to determine the presence of alcohol.

16
17 ~~NEW SECTION. Section 3. Limitations on employer liability. (1) An employer is not liable for~~
18 ~~monetary damages arising out of a drug or alcohol test that the employer requires an employee or~~
19 ~~prospective employee to take if the test is administered pursuant to a qualified testing program that is~~
20 ~~adopted and implemented by an employer to test employees for the presence of controlled substances or~~
21 ~~alcohol, unless:~~

22 ~~(a) the employer took disciplinary action against the employee based on a false test result and the~~
23 ~~employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable~~
24 ~~presumption that an employer's reliance on a test result is reasonable if the employer complies with the~~
25 ~~provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~
26 ~~8].~~

27 ~~(b) the employer committed defamation of character, libel, slander, or damage to reputation, as~~
28 ~~established by statute or common law, by knowingly disclosing false test results with malice.~~

29 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
30 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~

1 ~~abnormality, problem, or defect of any kind.~~

2
3 **NEW SECTION. Section 3. Qualified testing program.** A qualified testing program must comply
4 with the following criteria:

5 (1) Testing must be conducted according to the terms of written policies and procedures that must
6 be adopted by the employer and must be available for review by all employees and prospective employees
7 60 days before implementation. THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
8 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40. At a
9 minimum, the policies and procedures must require:

10 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful
11 manufacture, distribution, possession, or use of a controlled substance;

12 (b) the employer's proposal for educating or providing information to employees on the health risks
13 associated with the use of controlled substances and alcohol;

14 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol
15 by employees;

16 (d) a description of available employee assistance programs, including drug and alcohol counseling,
17 treatment, or rehabilitation programs that are available to employees;

18 (e) a description of the sanctions that the employer may impose on an employee if the employee
19 is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is
20 found to test positive for the presence of a controlled substance or alcohol;

21 (f) a statement that employees may be tested, including a ~~discussion~~ DESCRIPTION of the
22 circumstances that may trigger an immediate test;

23 (g) a list of controlled substances for which the employer intends to test AND A STATED
24 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

25 (h) a description of the employer's hiring policy with respect to prospective employees who test
26 positive;

27 (i) a detailed description of the procedures that will be followed to conduct the testing program,
28 including the resolution of a dispute concerning test results;

29 (j) a provision that all information, interviews, reports, statements, memoranda, and test results
30 are confidential communications that may not be disclosed to anyone except:

1 (i) the tested employee;

2 (ii) employees or agents of the employer who are specifically authorized by the tested employee

3 to ~~resolve~~ RECEIVE the employee's test results; or

4 (iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR

5 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-87~~] or in

6 response to inquiries relating to a workplace accident involving death, physical injury, or property damage

7 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or

8 contributed to the accident; and

9 (k) a provision that information obtained through testing that is unrelated to the use of a controlled

10 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be

11 released to the employer.

12 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's

13 standards of conduct, an employer may require an employee who tests positive on a test for controlled

14 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation

15 program as a condition of continued employment. An employer may require the employee to submit to

16 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation

17 program.

18 (3) Testing must be at the employer's expense, and all employees must be compensated at the

19 employee's regular rate, including benefits, for time attributable to the testing program.

20 (4) The collection ~~of~~, TRANSPORT, AND TESTING OF URINE samples must be performed IN ~~in a~~

21 ~~manner designed to protect the privacy of the employee, using, when practicable, screens or stalls, except~~

22 ~~that if an employer has reason to believe an employee may adulterate or substitute the required sample,~~

23 ~~the employer may require that the sample be provided under the direct supervision of testing personnel.~~

24 ~~(5) Samples must be handled under strict forensic chain of custody procedures. The procedures~~

25 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~

26 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~

27 ~~results.~~

28 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~

29 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~

30 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~

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~~techniques or techniques that are of comparable or superior quality with respect to validation~~
ACCORDANCE WITH 49 CFR, PART 40.

~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.

(6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

(7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S BODY.

NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES -- PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A QUALIFIED TESTING PROGRAM:

(1) AN EMPLOYER MAY TEST ANY NEWLY HIRED PROSPECTIVE EMPLOYEE WITHIN 5 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.

(2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

(A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

(B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

(I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

(II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

(III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

1 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
2 TESTING PROCESS; AND

3 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
4 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
5 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
6 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
7 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
8 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

9 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
10 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
11 ALCOHOL AT THE WORK SITE. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
12 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
13 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

14 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
15 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
16 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
17 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
18 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
19 OF REASONABLE SUSPICION.

20 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
21 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
22 HAVE CONTRIBUTED TO A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL
23 INJURY OR PROPERTY DAMAGE IN EXCESS OF \$1,500.

24
25 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
26 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
27 [SECTION 5.4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
28 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
29 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
30 EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR EXPLAIN THE RESULTS OF ANY

1 TEST.

2
3 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE ACTION MAY NOT
4 BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL
5 OPINION INDICATING THAT THE ORIGINAL TEST RESULTS WERE NOT CAUSED BY ILLEGAL USE OF
6 CONTROLLED SUBSTANCES OR BY ALCOHOL CONSUMPTION. IF THE EMPLOYEE PRESENTS A
7 REASONABLE EXPLANATION OR MEDICAL OPINION, THE TEST RESULTS MUST BE REMOVED FROM THE
8 EMPLOYEE'S RECORD AND DESTROYED.

9
10 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and
11 except for information that is required by law to be reported to a state or federal licensing authority, all
12 information, interviews, reports, statements, memoranda, or test results received by an employer through
13 a qualified testing program are confidential communications and may not be used or received in evidence,
14 obtained in discovery, or disclosed in any public or private proceeding.

15 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

16 (a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

17 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
18 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
19 contributed to the accident.

20
21 **Section 8.** Section 39-2-304, MCA, is amended to read:

22 "**39-2-304. Lie detector tests prohibited** ~~—regulation of blood and urine testing.~~ (1) A person, firm,
23 corporation, or other business entity or its representative may not require:

24 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
25 ~~or any form of a mechanical lie detector test;~~ as a condition for employment or continuation of employment.

26 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
27 ~~employment in:~~

28 ~~(i) hazardous work environments;~~

29 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

30 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~

~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test, except when:~~

~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use;~~

~~(ii) the employer has reason to believe that an employee may have contributed to a work related accident that causes death or personal injury or property damage in excess of \$1,500; or~~

~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR, part 40, and make it available to all persons subject to testing.~~

~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of drug or alcohol test results to the person tested and provide the person with the opportunity, at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an independent laboratory selected by the person tested. The person tested must be given the opportunity to rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection (1)(c)(ii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its representative shall, as soon as possible, make a written finding as to whether the act or failure to act is believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of the finding. The written record of a blood or urine test of an employee who is required to submit to testing pursuant to subsection (1)(c)(ii) and whose acts or failure to act is subsequently found not to be the direct or proximate cause of a work related accident must be removed from the employee's work record and be destroyed.~~

~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results of the test were not caused by alcohol consumption or illegal drug use.~~

~~(5) A person who violates this section is guilty of a misdemeanor.~~

~~(6) As used in this section:~~

~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

1 (b) ~~"intrastate" means commerce or trade that is begun, carried on, and completed wholly in this~~
2 ~~state."~~

3
4 NEW SECTION. Section 9. Codification instruction. [Sections 1 through ~~5-8~~ 7] are intended to
5 be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part
6 2, apply to [sections 1 through ~~5-8~~ 7].

7
8 NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID
9 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
10 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
11 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

12 -END-

MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By CHAIRMAN THOMAS KEATING, on March 11, 1997, at
3:45 P.M., in 413/415

ROLL CALL

Members Present:

Sen. Thomas F. Keating, Chairman (R)
Sen. James H. "Jim" Burnett, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Benedict (R)
Sen. C.A. Casey Emerson (R)
Sen. Dale Mahlum (R)
Sen. Fred Thomas (R)
Sen. Bill Wilson (D)

Members Excused: Sen. Debbie Bowman Shea (D)

Members Absent: None

Staff Present: Eddy McClure, Legislative Services Division
Gilda Clancy, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 341, HB 345, HB 447; 3-5-97
Executive Action: None

HEARING ON HB 341

Sponsor: REP. JOHN MERCER, HD 74, Billings

Proponents: Dean Randash, NAPA Auto Parts
Tom Stephens, NAPA Auto Parts
Boyd Vandeberg, Polson Auto Parts
Jay Shepard, Missoula Motor Parts
Robert Garding, NAPA Auto Parts
Richard Ike, Polson Auto Parts
Calvin Flink, Missoula Motor Parts

Opponents: None.

SENATE LABOR & EMPLOYMENT RELATIONS COMMITTEE

March 11, 1997

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SEN. MAHLUM asked if they can make a profession of this?

Mr. Gahagan said the way the industry is designed, he can pay his people between \$6.00 and \$7.50 per hour, but hopefully as the need arises they would like to raise the rates.

Closing by Sponsor:

REP. STOVALL said he thinks this bill is needed and it is important they have proper security people.

They will offer amendments for the State background checks. The companies will be careful who they hire because their reputations are on the line.

He asked for the Committee's support on HB 447.

HEARING ON 345

Sponsor: GAY ANN MASOLO, HD 40, Townsend

Proponents: Carl Schweitzer, Montana Contractors' Association
Ben Havdahl, Montana Motor Carriers' Association
Patrick Hayden, Empire Sand & Gravel Safety
Bob Worthington, Montana Municipal Insurance
Authority
Barbara Martin, Department of Transportation
Todd Thun, Representing Self
Dean Gurky, Diamond Construction
Steve Turkiewicz, Montana Auto Dealers'
Association
Don Allen, Montana Wood Products Association
Cecil Liter, Representing Self
David Owen, Montana State Chamber of Commerce
Leslie Brusanti, Pro-Med Services, Butte
Charles Brooks, Billings Chamber of Commerce

Opponents: Dan Edwards, Oil & Chemical Union
Darrell Holzer, Montana State AFL/CIO
Ed Logan, Pipefitter/Welder
Russell Hill, Montana Trial Lawyers
Jerry Driscoll, Montana Building Trades

Opening Statement by Sponsor:

Rep. GAY ANN MASOLO, HD 40, Townsend said HB 345 is a safety bill, for the employee, for the co-workers and for the general public.

This is a Workforce Drug and Alcohol Testing Act, which is also safety for a business which could be at a financial risk to the employees, causing injury or death while impaired by drug or alcohol.

This bill changes our current drug testing law. Alcohol has been added as a substance which can be tested. Two types of tests have been added to the list which employers can incorporate into a testing policy, random and follow-up tests. Also, this bill outlines the parameters an employer must follow in creating and implementing a drug and alcohol testing policy. These parameters provide fair and accurate testing and yet protect the employee's rights.

REP. MASOLO stated that some people may ask if this is an infringement of a worker's right to privacy. She said this is true, but there is a compelling interest for this infringement, mainly safety. When a worker is under the influence of drugs or alcohol, his fellow workers, the general public, and the business he works for is at risk. If a drug or alcohol test prevents just one injury on a job, then there is a compelling interest to test. The delicate balance between an individual's right to privacy and society's interest in a safe work environment, is tilted toward drug and alcohol testing and when people's lives and careers are jeopardized by another person's foolish and unlawful use of the alcohol or a drug on the job. HB 345 defines the parameters.

This is a voluntary program, not a mandatory requirement. The first parameter is that drug and alcohol testing can only be done on employees who are in hazardous work environments, security or fiduciary positions, or a position affecting public safety, also elected public officials. Each employer will have to evaluate his job descriptions and identify the positions which fit.

REP. MASOLO said Section 3, page 3 is the heart of the bill. This outlines the parameters. Employers must have a written drug and alcohol testing policy and procedures. These must be given to employees at least 60 days before implementation of/or being changes. A drug and alcohol testing program must follow the collection, handling, and testing procedures required by the federal government. (EXHIBIT 11)

Five types of drugs can be tested for. They are marijuana, cocaine, opium, amphetamines and PCP. Only breath alcohol testing equipment approved by the Federal Department of Transportation is acceptable for testing and breath alcohol concentration must be greater than .04% for a person to be considered having alcohol in their body. Employers must pay for the cost of the test and pay employees when they are being tested.

Section 4 outlines the types of drugs and alcohol tests which can be used.

An employer can test job applicants prior to employment. Also, there are two types of random tests. On a given date, every one on the work site in a hazardous work environment will be required to be blood or alcohol tested. This is a process similar to the

process by the Federal Department of Transportation for selecting who will be tested.

There is post-accident testing. If there is an accident with over \$1,500 in damages, the employee involved in the accident can be tested.

Follow-up testing is allowed if an employee has previously been found to be tested positive and gone through a rehabilitation program, the employer can require follow-up tests.

If there is reasonable suspicion when an employer has reason to believe that an employee is drunk or high on the job, a test can be required. To do a reasonable suspicion test, an employer must comply with the training requirements as outlined in the federal guidelines.

REP. MASOLO said the primary reason she introduced this bill is for safety. The other important considerations are productivity, quality workmanship, absenteeism, and a loss of equipment due to theft.

Every safeguard possible has been incorporated into this bill to ensure testing is done in a fair and accurate process. That individual privacy is protected and most important, the workplace is a safe area for employees, fellow workers, and the public.

(EXHIBIT 10) was distributed to the Committee.

Proponents' Testimony:

Carl Schweitzer, Montana Contractors' Association, handed out the federal guidelines for drug and alcohol testing. (EXHIBIT 11) These requirements have been built into the Montana law as more employees who are in hazardous work environments may be tested.

He referred to (EXHIBIT 10) and stated there may be a slight discrepancy in the amendment on line where the amendments are actually placed. The amendments are mostly technical in nature.

Ben Havdahl, Montana Motor Carriers' Association, stated all of the motor carriers, both interstate and intrastate commerce, have to comply with the federal regulations (EXHIBIT 11) in testing for alcohol and drug use, both drivers and mechanics.

However, by the same regulations, other employees are exempted. They support HB 345 because it will give permission to test those other employees.

One problem they have with the bill is on page 2, line 2, in the definition of hazardous work environment, the reference is made to an interstate motor carrier. This may lead to a decision that it be interpreted to mean it would not apply to an intrastate motor carrier. They are offering an amendment to strike the word

"intrastate" and substitute in front the word "commercial", so that it would read "commercial motor carrier". That would include motor carriers operating in both interstate and intrastate commerce. (EXHIBIT 12)

Patrick Hayden, Safety Director, Empire Sand & Gravel, said they recently started a program in January. Another business similar to their own adopted a drug and alcohol testing program and Empire Sand & Gravel hired the people they did not want. The people who failed their pre-screen drug test came to Empire Sand & Gravel, so they began the same program.

Mr. Hayden stated the problem they are now running into is that these guys are studying for the test. They are not screening anyone, so they aren't catching anybody on the pre-employment test. They have the right to do a first accident test. They have had three accidents this year and one already tested positive on drugs.

They are asking for support to test randomly. **Mr. Hayden** said, "When you are going down the highway and you have our scrapers running alongside the road, with you and your family going through our construction project, we are asking for the opportunity to find out if we have a problem with an operator or somebody on that crew before they have an accident. We find out about it post-accident, instead of before."

Bob Worthington, Programs Administrator, Montana Municipal Insurance Authority, stated when this bill was introduced in the House it dealt only with private employers. They had some concerns with that and it has now been amended to deal with both public and private work forces. They encourage the Committee's support.

Barbara Martin, Montana Department of Transportation, said they support this bill and the amendments proposed.

Tye Schulz, Teamster Union Construction Worker, Representing Self, said regarding unions which may say they are against this bill, not once was he asked how he feels about it. They do not speak for him and they don't speak for a lot of union members. He is for this bill.

Mr. Schulz stated there is not much argument for the invasion of privacy because no one's right to privacy is more important than his right to work in a drug-free environment. Right now all he has for protection is a hardhat and that is not going to protect him from a scraper when someone on drugs is operating it. The only protection he feels he would have is the passage of this bill to allow random drug testing. He feels the present drug testing program is good, but it misses a lot of people, including the mechanics who work on the brakes, the steering of all this heavy machinery, it misses the operators running it, it misses everybody except the truck drivers. It is not fair to test truck

drivers and not everyone else. There is definitely a problem in the workforce.

Dean Gurky, President, Diamond Construction, urged the Committee to support this bill. There is a real need for it in industry. This is another step and tool which would help.

He stated he did drug testing in the Navy for 30 years and can vouch for the fact when there are requirements of random drug testing, it elevates the level of people you work with and the concern for safety.

{Tape: 1; Side: B; Approx. Time Count: 4:29 p.m.}

Steve Turkiewicz, Executive Vice President, Montana Auto Dealers' Association, said they employ approximately 4,000 people throughout the state. They would like to be in a position to assure their employees at the dealerships, as well as their customers, that they have provided a workplace free from drugs. They support this bill.

Don Allen, Montana Wood Products Association, supported this bill. He said the nature of the wood products industry in the sawmills with the types of equipment that run there make it very dangerous work in many instances. This is a safety issue and it is too late after an accident.

Cecil Liter, Billings, Representing Self, said he runs equipment and sometimes works in administration for companies.

Last year he observed someone who had taken drugs and there was no mechanism to get this person out. He went to the local union couldn't do anything. The result of this was a half-million dollar piece of equipment collided with a quarter-million dollar piece of equipment and caused considerable down-time. No one was injured but it was very stressful to work under those conditions every day or every night. It is time to bring Montana up to date on drug testing.

Mr. Liter said there have been over 20 deaths in mines since 1992 and these jobs are a big risk even without employees who take drugs.

David Owen, Montana Chamber of Commerce, told about an experience a member of the Chamber of Commerce had when OSHA walked in his office unannounced for six hours, went through his files, talked to his employees and went everywhere in his factory. We would never tolerate in our homes, but to pursue public safety we tolerate that in the business world. We should be careful before we take these kinds of regulations in this bill.

But this bill seems to **Mr. Owen** to have the kinds of conditions in it to compel public interest to its worth of any intrusion which may be portrayed.

Mr. Owen said he had also been asked to mention that **Riley Johnson, National Federation Independent Business**, also asked for support of this bill.

Leslie Brusanti, Pro-Med Services, Butte, said her company is involved in many phases of the testing process. They have a very close association with several federally certified laboratories that do they type of testing discussed. She works closely with several medical review officers.

She stated this bill is very closely patterned after the federal regulations which have been working very well in the workplace the past several years. There are very good considerations for confidentiality, and there is a safety net regarding the split specimen testing for the gas permatography confirmation process. The testing certification of alcohol equipment and the certification of the testers are all processes **Ms. Brusanti** has been involved in.

This bill does contain safety nets which will not only protect the employee from false accusations, but also give the employer good information which is valid and reproducible and which will hold up in a court of law if positive testing is found.

Charles Brooks, Billings Chamber of Commerce, stood in strong support of HB 345.

He said we all need to recognize we have a problem as far as drugs are concerned. We must address this problem.

Mr. Brooks quoted The Bozeman Daily Chronicle, March 10th issue, "Drug Craze Invades America's Heartland". A very threatening statement from this article was, "Amphetamine has ruined lives, has filled jails, it has flooded our courts, it has frustrated our law enforcement officers. Years ago he predicted it would be the biggest problems we had but I still didn't realize what it would turn out to be", said Scott County Sheriff, Bill Farrell from Benton, Missouri. "It has snowballed, but it is underground and you do not know what you've got until it's too late".

Mr. Brooks said this is part of the problem in the workplace from the testimonies already heard. Drugs ruins careers, both at the executive level and at the hourly rate level. He urges a favorable consideration as it is much needed in our communities.

Opponents' Testimony:

Dan Edwards, International Representative, Oil, Chemical & Atomic Workers International Union, AFL/CIO, opposed HB 345. (EXHIBIT 13)

Darrell Holzer, Political Director, Montana State AFL/CIO, also opposed HB 345. (EXHIBIT 14)

Ed Logan, Pipefitter Welder, Exxon, Billings, said he has been with Exxon over 20 years and currently Exxon enjoys the best safety record it has ever had.

He stated this bill is not needed. Currently employers can have a pre-employment test and if somebody appears impaired on the job they can be sent home.

Mr. Logan stated this law is not going to do what everybody thinks it is going to do. He works at a refinery and there are numerous contractors in it. If it is voluntarily left up to the employee, half of the contractors in the refinery or in a construction site are going to have a program and the rest are not. It will not do any good because you cannot catch everyone on the job site.

He said it has been amended several times and he noticed elected officials are included so he distributed a handout from the International Union of Police Associations (**EXHIBIT 15**) so the Committee could determine how to have negative testing.

Russell Hill, Montana Trial Lawyers Association, said he looked forward to standing up to testify before the revisions were made to this bill. At that time he could read it and now he has not seen the amendments. He stated this is a radical improvement over the bill which was introduced, however the Montana Trial Lawyers still oppose it simply because it is an invasion of privacy without connection to impairment or reasonable suspicion or anything related to that.

This bill requires Montana citizens who hate drugs and alcohol to submit to an invasive procedure. When the proponents state if we can prevent just one injury in the State that is a compelling enough interest to do this procedure, **Mr. Hill** says he disagrees. The compelling interest should be to protect individual privacy.

This bill is still only voluntary for employers and not employees. If drugs are such a serious problems that we are leaving it to the discretion of employers, the fact is it is a cheaper alternative to close supervision and actually terminating impaired employees.

Mr. Hill quoted The Helena Independent Record, January 9, 1997 issue. The headline stated "Airline Sues Pilot's Ex-Wife Who Baked With Marijuana". The article said, "The pilot's Ex-wife baked rye bread for him using her own recipe for revenge, allegedly adding marijuana to get him in trouble. Continental Airlines charges in a lawsuit that Debra Leading's baking spree in '94 endangered passengers and resulted in the firing of her Ex-husband, William. Leading, a ten-year pilot, was dismissed after a random drug test in 1994 detected marijuana. The test was done two days after he ate bread baked for him by his Ex-wife, according to the lawsuit filed last week. He was reinstated this last October of 1996, after Mrs. Leading had

admitted what she had done, Continental said. Leading appealed his dismissal through his union's grievance system, denying he used drugs. The first two hearing officers, unaware of Mrs. Leading's wrong-doing, upheld the firing. It wasn't until they found out what she had done that he was finally re-instated."

Mr. Hill said this bill jeopardizes the livelihood of people who can't provide a convincing explanation of why something is in their system. That is a huge invasion of individual privacy.

Jerry Driscoll, Montana Building Trades, said he would like to call attention to problems in the bill.

Page 1 contains the definition of an employee who is engaged in a performance of work. Page 2 states a perspective employee is anybody who has a written application for work. Page 5 says you can only test perspective employees. **Mr. Driscoll** says if they aren't tested prior to hire, you cannot test them.

Mr. Driscoll stated on page 6, lines 9 through 11, states an employee may require follow-up testing if an employee has misused controlled substance or alcohol at the work site. He believes the wording should be changed in this because when someone wants a job, he should be able to start right away. Under this section, they are not able to test someone if they don't do it before they go to work.

Darrell Holzer distributed information for **Scott Crichton, Executive Director, American Civil Liberties Union, (ACLU)**.
(EXHIBIT 16)

Questions From Committee Members and Responses:

SEN. CASEY EMERSON asked **Darrell Holzer** in regards to having to a foreman having to let people go because they were impaired on drugs or alcohol, did **Mr. Holzer** ever have any come back and ask to prove they were impaired and if so, how?

Darrell Holzer answered all, **SEN. EMERSON** said transpired with the exception that all the folks he terminated in ten years never challenged the termination. He always let them know what was and what wasn't allowed before the employee ever started work for him.

SEN. BILL WILSON asked **REP. MASOLO** in regards to the alcohol limit, he heard her state .04%. In reading the federal guidelines, he saw .04 as the threshold and asked if that was correct.

REP. MASOLO responded that she did request that because a Senate Bill had come through at .04%. She requested this to make it uniform.

SEN. WILSON asked if that is federal guidelines. He said he thinks that is only 2½ beers or drinks. He does not know if that level is what we want.

REP. MASOLO said she was comfortable with the .04 after talking it over with people who test. They felt the .02 might possibly show if someone had a beer the night before.

SEN. WILSON redirected the question the question to Leslie Brusanti. She submitted a alcohol testing chart. (EXHIBIT 17) .02% is the federal regulation right now. Anyone who tests at .02% to .39% under federal regulations are mandatorily withdrawn from their position for 24 hours. The next cut off is the .04% threshold. That then requires that employee to go through substance abuse professional counselling guidelines before they are permitted back to their hazardous duty.

Ms. Brusanti stated that she believes REP. MASOLO was taking that extra step out. If they need counselling they would go through the whole process of federal regulations, then it would be up to the employer in their own policy whether or not they want a zero tolerance law. This would have to be provided in their own policy in addition to the regulation the Montana law would provide.

SEN. WILSON asked Ms. Brusanti since she does this testing, if a person is employed by someone who tests a sample, is she familiar with that capability?

Ms. Brusanti answered the federal regulations right now require all testing be done in a federally certified lab. There are about 70 of those labs in the country.

{Tape: 2; Side: A; Approx. Time Count: 5:05 p.m.}

SEN. WILSON asked if Ms. Brusanti would refer a specimen to another facility.

Ms. Brusanti said yes, this law requires that all testing be done at a federally regulated laboratory to provide that safety net. They want to ensure that no false positive are reported. The safety net provides that if this federally regulated laboratory is under such scrutiny, they go through several protocols to ensure the integrity of each sample.

Another safety net, in referring to (EXHIBIT 15), under the testing in HB 345, those things do not show a false positive, with the exception of poppy seeds and under gas permatography that can also be ruled out.

SEN. WILSON asked REP. MASOLO if we are blazing a new trail here and if she has any information regarding what is going on in other states who are going outside of federal random testing.

REP. MASOLO said Nevada, Arizona, Maryland and other states nationally are doing this also. Several national people have phoned her and commented on the very restrictive drug testing. We may be blazing a new trail but there are other states who have this.

SEN. SUE BARTLETT stated on page 5, it specifies on line 12 that a breath alcohol test result must indicate an alcohol concentration of greater than .04 for a person to be considered as having alcohol in the person's body. Then on page 3, line 23 says that the employer must include a list of controlled substances in a stated alcohol concentration level above which a tested employee must be sanctioned. **SEN. BARTLETT** said those sections appear to be in conflict and asked **REP. MASOLO** if she had looked at that potential conflict.

REP. MASOLO said she hasn't. In a subcommittee meeting she said she wanted .04% in the bill.

Carl Schweitzer said he didn't think there is a conflict here. On page 5 what is being said is that an employer cannot set something from 0.04 to sanction an employee. Page 3 is allowing that employer to set that limit. He could set it at or .09 or .05. So it is mandated at where the tolerances and limits can be set. It states it cannot be set at .04 or below. That is the relationship between those two sections.

SEN. BARTLETT said with all due respect, that may be what is intended but she doesn't believe that is what is accomplished in this bill. They have seen many bills this session which did not accomplish what the very people who brought the bill for wanted to accomplish. What is wrong with the current law? What documented, demonstrated evidence can you give that the current law is so inadequate that only random testing will solve the problem.

Mr. Schweitzer said one of the proponents in the House, who was unable to attend this hearing is Mr. Fred Dahlman of Sletten Construction. That company is a good example because they have a workforce in Montana, Nevada and Arizona. When they instituted a drug and alcohol testing program in Arizona, which does include random testing, they had a Worker's Compensation rating in 1990 of about 1.74 mod. factor. This year it is down to .65. Mr. Dahlman attributes that to their drug and alcohol program among other things. The people who work for Sletten Construction know they have the potential for being tested. There are a lot of people who don't apply at Sletten anymore.

There are other companies which also test for drugs right now, such as Copp and JTL, and they want the option of random testing.

SEN. BARTLETT said she has never known an employer who didn't want to gain as much control as feasible in order to get the employee to be productive. She said **Mr. Schweitzer** said the Copp

and JTL experienced a good safety record, and they have been told in their testimony that they have a tough testing program under the existing law. What demonstrated evidence do they have that this change would improve their safety records sufficiently to even make them notice it?

Mr. Schweitzer responded when Wayne Hall from JTL testified in the House, he had some specific numbers of comparing the truck driving segment of his company, which does have random testing under the federal guidelines and what their safety record was compared with the non-truck drivers. There was a remarkable difference there. Mr. Hall felt if we could now have this random testing on everybody that is in a safety position, we could bring everybody up to that level of safety.

SEN. BARTLETT said so basically, **Mr. Schweitzer**, we have people's opinions.

Mr. Schweitzer said he thinks there are facts, but he does not have them with him. Mr. Hall could show that between the truck driving and the non-truck driving segment, there was no difference in the safety record.

SEN. BARTLETT asked if there were any other factors which might have influenced the safety record of the different occupations.

Mr. Schweitzer said the only difference he knew of was the difference in testing.

SEN. BARTLETT said apparently that was the only difference which was cited, but that may not be the only difference in the occupations that affect the safety records. Is that possible?

Mr. Schweitzer answered that is possible.

SEN. BARTLETT asked **Patrick Hayden** in his testimony he said he had instituted a testing program at Empire Sand & Gravel because other people in the same types of business in his area had testing programs when Empire Sand didn't and they were getting people that didn't get hired by the competitors because they had tested positive. She said then **Mr. Hayden** said that no one could be caught with pre-employment testing. That was contradictory.

Mr. Hayden said a lot of the employees they had problems with, once they found out other construction companies were doing tests they quit. If they tested positive, for instance, JTL would discharge them and they would go to work at Empire Sand & Gravel.

They train all their employees prior to the program and prior to employment. So when they know when the job will begin, they decide not to take their amphetamine for a certain number of days, or they don't smoke marijuana for two or three weeks the test is easy. Then there is an accident.

This bill will improve the safety end of the program because it will positively identify people with the problem prior to the accident. The bottom line in safety is to be pro-active with the random testing. If they do have a problem, we could get them some help, get them back to work, or if they don't want help and want to take drugs, they can be discharged at that time.

SEN. BARTLETT said she does believe **Mr. Hayden** believes that, but he need not wait for an accident under the current law if you have reason to believe that the person's faculties are impaired on the job. She asked if he trains his supervisors and workers to be aware of that provision as well and encourage them to identify people they think are on drugs.

Mr. Hayden said they train their supervisors and the problem with that is the supervisors don't want to report these people because they are afraid to call one of their employees on it. When an employee is harassed by other employees when they turn somebody in.

SEN. BARTLETT said to some extent, the legislature is suppose to solve your problems by passing a law because your supervisors are unwilling to carry out that aspect of their management responsibilities.

Mr. Hayden said these guys sometimes become friends and won't turn their buddy in. There are a lot of things that happen out in the field and he does not agree with **SEN. BARTLETT'S** statement.

SEN. WILSON said when he sees members of this Committee he sees people who are predominately involved in supervised white collar positions throughout their careers. He asked **Tye Schulz** to characterize his job and the type of supervision he has.

Mr. Schulz said in the companies he has worked for, the people who work on the road, end up getting to be one big family. The ones who drive together during the day drink together at night. **Mr. Schulz** said he was one of those people. He went through treatment in 1985 and has used drugs on the workforce.

On the paving crew that he is currently working, there was a fist fight over \$500 worth of amphetamines which were stolen out of a lunch box. The supervisor on that crew does drugs as well as everybody who works under him. There is no one to go to to report drug users.

SEN. WILSON asked, then, if he had the experience of seeing that happen out on the work place, so he imagined **Mr. Schulz** came from another vantage point.

Mr. Schulz said people who use drugs spend years figuring out ways not to get caught. The drivers that **Mr. Schulz** used to take drugs with, when they enacted the law that they had to submit to

random drug testing, most quit. They choose their drugs over their jobs. Unless an employee causes an accident, the contractors are too afraid to call someone on using drugs because of law suits.

If someone shows up staggering drunk, it is easy to tell, but on amphetamines, and coke, and speed, it is not so easy to see. If you put on a pair of sunglasses, no one can tell what their eyes look like.

SEN. MAHLUM complimented **Mr. Schulz** for coming forward with his testimony as a member of his industry.

SEN. BARTLETT asked **Carl Schweitzer** if he could provide a list of the instances and the case names in which the contractors have been sued by employees who have tested positive in a drug test under the current program.

Mr. Schweitzer responded he could put out a questionnaire and find out.

CHAIRMAN KEATING said regarding the language on page 8, line 21 in which a post-accident test is found and the employee was not a director of proximate cause of the work-related accident. That language is stricken. Also, on page 6, line 28, an employer may require an employee to be tested for controlled substance or alcohol if the employer has reason to believe the employee may have contributed to a work-related accident in excess of \$1,500. Some of the language has been put back in but the language on the test of the person who was not involved in the accident has not been purged. He asked **Carl Schweitzer** if there is a reason for that.

Mr. Schweitzer responded that language could be put back in, he has no problem with that. That is the first time this has come up.

SEN. EMERSON said he also looked at that and thinks this whole section is already in the law.

CHAIRMAN KEATING said Section 8, on page 7, the first several lines are written into the bill and everything else is deleted, so all of Section 8 is amended in the statutes by this page and by being amended, that language is deleted, not from the bill but from the statutes. If all of Section 8 is deleted, that means it is deleted from the bill but not from the statutes.

In order to retain the clause about purging the employees records if he is not involved in the accident, probably should be put back in.

Mr. Schweitzer said it would be appropriate to put it back in.

Closing by Sponsor:

REP. MASOLO thanked all who testified. Several people have told her this is a serious problem and they feel endangered. She has visited people in the Capitol from Federal Express and spoke with a man who told her how serious the problem is in the cement business.

She believes in random testing, because if you tell an employee you are going to test him, they will be prepared. REP. MASOLO'S husband is the road supervisor in Broadwater County and has the random drug testing and sees nothing wrong with it.

She has been a union member and hoped the union bosses would have been looking out for her safety.

She also realizes people are afraid of wrongful discharge.

She believes this bill is good and stated if a person is not a user of drugs in the workplace, they won't be a loser with this bill.

Amendments to HB 345 3rd Reading Copy

1. Page 2 line 2 following "aviation. Strike: "interstate.
This amendment is need because the word interstate may exclude intrastate motor carriers from being tested.
2. Page 3 line 20 following "(f)" strike all of lines 20 and 21 and insert
" identification of the types of controlled substance and alcohol tests to be used from types
of tests listed in section 4;"
*This amendment is needed because the employer needs to identify the types of testing to
be utilized in the company's policy manual.*
3. Page 4 line 1 following "(ii)" strike "employees or agents" and insert "the designated
representatives"
following "authorized" strike "by the tested employee"
*These change specify that only the employee and the employers designated
representatives are able to see the confidential test results.*
4. Page 6 line 8 following "(3)" strike all of lines 8 and 9 through "site," on line 10 and insert:
"an employer may require an employee to submit to follow-up tests if the employee has
had a verified positive test for a controlled substance or alcohol."
This amendment clarifies when follow-up tests can be administered.

PART 40 — PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

Subpart A — General

- Sec.
40.1 Applicability.
40.3 Definitions.
40.5-40.19 (Reserved)

Subpart B — Drug Testing

- 40.21 The drugs.
40.23 Preparation for testing.
40.25 Specimen collection procedures.
40.27 Laboratory personnel.
40.29 Laboratory analysis procedures.
40.31 Quality assurance and quality control.
40.33 Reporting and review of results.
40.35 Protection of employee records.
40.37 Individual access to test and laboratory certification results.
40.39 Use of DHHS-certified laboratories.

Subpart C — Alcohol Testing

- 40.51 The breath alcohol technician.
40.53 Devices to be used for breath alcohol tests.
40.55 Quality assurance plans for EBTs.
40.57 Locations for breath alcohol testing.
40.59 The breath alcohol testing form and log book.
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40.69 Inability to provide an adequate amount of breath.
40.71 (Reserved)
40.73 (Reserved)
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40.77 (Reserved)
40.79 Invalid Tests.
40.81 Availability and disclosure of alcohol testing information about individual employees.
40.83 Maintenance and disclosure of records concerning EBTs and BATs.

Subpart D—Non-Evidential Alcohol Screening Tests

- 40.91 Authorization for use of non-evidential alcohol screening devices.
40.93 The screening test technician.
40.95 Quality assurance plans for non-evidential screening devices.
40.97 Locations for non-evidential alcohol screening tests.
40.99 Testing forms.
40.101 Screening test procedure.
40.103 Refusals to test and uncompleted tests.
40.105 Inability to provide an adequate amount of breath or saliva.
40.107 Invalid tests.
40.109 Availability and disclosure of alcohol testing information about individual employees.
40.111 Maintenance and disclosure of records concerning non-evidential testing devices and STTs.

Appendix A — Drug Testing Custody and Control Form

Appendix B — The Breath Alcohol Testing Form

AUTHORITY: 49 U.S.C. 102,301,322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a

Subpart A — General

§40.1 Applicability.

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

§40.3 Definitions.

The following definitions apply to this part:

Air blank. A reading by an EBT of ambient air containing no alcohol. (In EBTs using gas chromatography technology, a reading of the device's internal standard.)

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol use. The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Breath Alcohol Technician (BAT). An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

Canceled or invalid test. In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under §40.79. It is neither a positive nor a negative test.

Chain of custody. Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, these procedures shall require that an appropriate drug testing custody form (see

§40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

Confirmation (or confirmatory) test. In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

DHHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

Employee. An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, employer includes an industry consortium or joint enterprise comprised of two or more employing entities.

EBT (or evidential breath testing device). An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL), and identified on the CPL as conforming with the model specifications available from the National Highway Traffic Safety Administration, Office of Alcohol and State Programs.

Medical Review Officer (MRO). A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results gener-

ated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Screening test (or initial test). In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Secretary. The Secretary of Transportation or the Secretary's designee.

Shipping container. A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

Substance abuse professional. A licensed physician (Medical Doctor or Doctor of Osteopathy); or a licensed or certified psychologist, social worker, or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol & Other Drug Abuse). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

§§40.5 - 40.19 [Reserved]

Subpart B — Drug Testing

§40.21 The drugs.

(a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines and phencyclidine.

(b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the DHHS has established an approved testing protocol and positive threshold for each such substance.

(c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations.

(d) This section does not prohibit procedures reasonably incident to analysis of the specimen for controlled substance (e.g., determination of pH or tests for specific gravity, creatinine concentration or presence of adulterants).

§40.23 Preparation for testing.

The employer and certified laboratory shall develop and maintain a clear and well-documented procedure for collection, shipment, and accessioning of urine specimens under this part. Such a procedure shall include, at a minimum, the following:

(a)(1) Except as provided in paragraph (a)(2) of this section, use of the drug testing form prescribed under this part.

(i) This form is found in Appendix A to this part.

(ii) Employers and other participants in the DOT drug testing program may not modify or revise this form, except that the drug testing custody and control form may include such additional information as may be required for billing or other legitimate purposes necessary to the collection, provided that personal identifying information on the donor (other than the social security number or other employee ID number) may not be provided to the laboratory.

(iii) Donor medical information may appear only on the copy provided the donor.

(2) Notwithstanding the requirement of paragraph (a)(1)(ii) of this section, employers and other participants may use existing forms that were in use in the DOT drug testing program prior to February 16, 1995, until June 1, 1995.

(b)(1) Use of a clean, single-use specimen bottle that is securely wrapped until filled with the specimen. A clean, single-use collection container (e.g., disposable cup or sterile urinal) that is securely wrapped until used may also be employed. *If urination is directly into the specimen bottle*, the specimen bottle shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided. *If a separate collection container is used for urination*, the collection container shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided; and the collection site person shall unwrap the specimen bottle in the presence of the employee at the time the urine specimen is presented.

(2) Use of a tamperproof sealing system, designed in a manner such to ensure against undetected opening. The specimen bottle shall be identified with a unique identifying number identical to that appearing on the urine custody and control form, and space shall be provided to initial the bottle affirming its identity. For purposes of clarity, this part assumes use of a system made up of one or more preprinted labels and seals (or a unitary label/seal), but use of other, equally effective technologies is authorized.

(c) Use of a shipping container in which the specimen and associated paperwork may be transferred and which can be sealed and initialled to prevent undetected tampering. If the split specimen option is exercised, the split specimen and associated paperwork shall be sealed in a shipping (or storage) container and initialled to prevent undetected tampering.

(d) Written procedures, instructions and training shall be provided as follows:

(1) Employer collection procedures and training shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate.

(2) A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is provided instructions for collection under this part and certifies completion as required in this part.

(i) A non-medical collection site person shall receive training in compliance with this part and shall demonstrate proficiency in the application of this part prior to serving as a collection site person. A medical professional, technologist or technician licensed or otherwise approved to practice in the jurisdiction in which the collection takes place is not required to receive such training if that person is provided instructions described in this part and performs collections in accordance with those instructions.

(ii) Collection site persons shall be provided with detailed, clear instructions on the collection of specimens in compliance with this part. Employer representatives and donors subject to testing shall also be provided standard written instructions setting forth their responsibilities.

(3) Unless it is impracticable for any other individual to perform this function, a direct supervisor of an employee shall not serve as the collection site person for a test of the employee. If the rules of a DOT agency are more stringent than this provision regarding the use of supervisors as collection site personnel, the DOT agency rules shall prevail with respect to testing to which they apply.

(4) In any case where a collection is monitored by non-medical personnel or is directly observed, the collection site person shall be of the same gender as the donor. A collection is monitored for this purpose if the enclosure provides less than complete privacy for the donor (e.g., if a restroom stall is used and the collection site person remains in the restroom, or if the collection site person is expected to listen for use of unsecured sources of water.)

§40.25 Specimen collection procedures.

(a) **Designation of collection site.** (1) Each employer drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory. An independent medical facility may also be utilized as a collection site provided the other applicable requirements of this part are met.

(2) A designated collection site may be any suitable location where a specimen can be collected under conditions set forth in this part, including a properly equipped mobile facility. A designated collection site shall be a location having an enclosure within which private urination can occur, a toilet for completion of

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urination (unless a single-use collector is used with sufficient capacity to contain the void), and a suitable clean surface for writing. The site must also have a source of water for washing hands, which, if practicable, should be external to the enclosure where urination occurs.

(b) **Security.** The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen.

(1) Procedures shall provide for the designated collection site to be secured. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(2) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present and undetected access (e.g., through a rear door not in the view of the collection site person) is not possible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the employee or distraction of the collection site person.

(3) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed mailer is transferred for shipment, the following minimum procedures shall apply. The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in the mailer. The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person.

(c) **Chain of custody.** The chain of custody block of the drug testing custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Since specimens and documentation are sealed in shipping containers that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the

collection site. Every effort shall be made to minimize the number of persons handling specimens.

(d) **Access to authorized personnel only.** No unauthorized personnel shall be permitted in any part of the designated collection site where urine specimens are collected or stored. Only the collection site person may handle specimens prior to their securement in the mailing container or monitor or observe specimen collection (under the conditions specified in this part). In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, the collection site person shall have only one donor under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialled, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of an employee who was unable to provide a complete specimen, has entered a waiting area).

(e) **Privacy.** (1) Procedures for collecting urine specimens shall allow individual privacy unless there is a reason to believe that a particular individual may alter or substitute the specimen to be provided, as further described in this paragraph.

(2) For purposes of this part, the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute the specimen.

(i) The employee has presented a urine specimen that falls outside the normal temperature range (32°—38°C/90°—100°F), and

(A) The employee declines to provide a measurement of body temperature (taken by a means other than use of a rectal thermometer), as provided in paragraph (f)(14) of the part; or

(B) Body temperature varies by more than 1°C/1.8°F from the temperature of the specimen;

(ii) The last urine specimen provided by the employee (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below .2g/L;

(iii) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.); or

(iv) The employee has previously been determined to have used a controlled substance without medical authorization and the particular test was being conducted under a DOT agency regulation providing for follow-up testing upon or after return to service.

(3) A higher-level supervisor of the collection site person, or a designated employer representative, shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based upon the circumstances described in subparagraph (2) of this paragraph.

(f) **Integrity and identity of specimen.** Employers shall take precautions to ensure that a urine specimen is not adulterated or diluted during the collection procedure and that information on the urine bottle and on the urine custody and control form can

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identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. Where practicable, there shall be no other source of water (e.g., shower or sink) in the enclosure where urination occurs. If there is another source of water in the enclosure it shall be effectively secure or monitored to ensure it is not used as a source for diluting the specimen.

(2) When an individual arrives at the collection site, the collection site person shall ensure that the individual is positively identified as the employee selected for testing (e.g., through presentation of photoidentification or identification by the employer's representative). If the individual's identity cannot be established, the collection site person shall not proceed with the collection. If the employee requests, the collection site person shall show his/her identification to the employee.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet. If the employee requests it, the collection site personnel shall provide the employee a receipt for any personal belongings.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy. The collection site person shall provide the individual with a specimen bottle or collection container, if applicable, for this purpose.

(8) The collection site person shall note any unusual behavior or appearance on the urine custody and control form.

(9) In the exceptional event that an employer-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., circumstances require a post-accident test), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public restroom which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible

toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(i)(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, or Federal Aviation Administration shall use the "split sample" method of collection for those employees.

(ii) Employers using the split sample method of collection shall follow the procedures in this paragraph (f)(10)(ii):

(A) The donor shall urinate into a collection container or a specimen bottle capable of holding at least 60 ml.

(B)(1) If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one specimen bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen.

(2) If a single specimen bottle is used as a collection container, the collection site person, in the presence of the donor, shall pour 15 ml of urine from the specimen bottle into a second specimen bottle (to be used as the split specimen) and retain the remainder (at least 30 ml) in the collection bottle (to be used as the primary specimen).

(C) Nothing in this section precludes the use of a collection method or system that does not involve the physical pouring of urine from one container or bottle to another by the collection site person, provided that the method or system results in the subdivision of the specimen into a primary (30 ml) and a split (at least 15 ml) specimen that can be transmitted to the laboratory and tested in accordance with the requirements of this Subpart.

(D) Both bottles shall be shipped in a single shipping container, together with copies 1,2, and the split specimen copy of the chain of custody form, to the laboratory.

(E) If the test result of the primary specimen is positive, the employee may request that the MRO direct that the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result.

(F) When the MRO informs the laboratory in writing that the employee has requested a test of the split specimen, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the chain of custody form with appropriate chain of custody entries.

(G) The result of the test of the split specimen is transmitted by the second laboratory to the MRO.

(H) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split specimen.

(I) If the result of the test of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the cancellation and the reasons for it to the DOT, the employer, and the employee.

(iii) Employers using the single sample collection method shall follow the procedures in paragraph:

(A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container.

(B) If a separate collection container is used, the collection site person shall pour at least 30 ml of the urine from the collection container into the specimen bottle in the presence of the employee.

(iv)(A)(1) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if the specimen has at least 30 milliliters of urine for a single specimen collection or 45 milliliters of urine for a split specimen collection.

(2) If the individual has not provided the required quantity of urine, the specimen shall be discarded. The collection site person shall direct the individual to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a new urine specimen, whichever occurs first. If the employee refuses to drink fluids as directed or to provide a new urine specimen, the collection site person shall terminate the collection and notify the employer that the employee has refused to submit to testing.

(3) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, the collection site person shall discontinue the collection and notify the employer.

(B) The employer shall direct any employee who does not provide a sufficient urine specimen (see paragraph (f)(10)(iv)(A)(3) of this section) to obtain, as soon as possible after the attempted provision of urine, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's ability to provide an adequate amount of urine.

(1) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of urine, the employee's failure to provide an adequate amount of urine shall not be deemed a refusal to take a test. For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a documented pre-exist-

ing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration. The physician shall provide to the MRO a brief written statement setting forth his or her conclusion and the basis for it, which shall not include detailed information on the medical condition of the employee. Upon receipt of this statement, the MRO shall report his or her conclusions to the employer in writing.

(2) If the physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (f)(10)(iv)(B)(1) of this section, the employee's failure to provide an adequate amount of urine shall be regarded as a refusal to take a test. The physician shall provide to the MRO a brief written statement setting forth his or her conclusion and the basis for it, which shall not include detailed information on the medical condition of the employee. Upon receipt of this statement, the MRO shall report his or her conclusions to the employer in writing.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measure is critical and in no case shall exceed 4 minutes.

(13) A specimen temperature outside the range of 32°—38° C/90°—100° F constitutes a reason to believe that the individual has altered or substituted the specimen (see paragraph (e)(2)(i) of this section). In such cases, the individual supplying the specimen may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted on the urine custody and control form.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual has altered or substituted the specimen as described in paragraph (e)(2)(i) or (iii) of this section, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. As provided below, the specimen shall be sealed (by placement of a tamperproof seal over the bottle cap and down the sides of the bottle) and labeled in the presence of the employee. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual being tested shall be present at the same time during

procedures outlined in paragraphs (f)(19) - (f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the employer. If separate from the label, the tamper-proof seal shall also be applied.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter on the drug testing custody and control form all information identifying the specimen. The collection site person shall sign the drug testing custody and control form certifying that the collection was accomplished according to the applicable Federal requirements.

(22)(i) The individual shall be asked to read and sign a statement on the drug testing custody and control form certifying that the specimen identified as having been collected from him or her is in fact the specimen he or she provided.

(ii) When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others.

(23) The collection site person shall complete the chain of custody portion of the drug testing custody and control form to indicate receipt of the specimen from the employee and shall certify proper completion of the collection.

(24) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, the collection site person shall ensure that it is appropriately safeguarded during temporary storage.

(25)(i) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the collection site person shall take the specimen and drug testing custody and control form with him or her or shall secure them. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, he or she shall package the specimen for mailing before leaving the site.

(ii) The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialed by the employee. If it becomes necessary for the collec-

tion site person to leave the site during this interval, the collection shall be nullified and (at the election of the employer) a new collection begun.

(g) **Collection control.** To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled.

(h) **Transportation to laboratory.** Collection site personnel shall arrange to ship the collected specimen to the drug testing laboratory. The specimens shall be placed in shipping containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes and/or padded mailers); and those containers shall be securely sealed to eliminate the possibility of undetected tampering with the specimen and/or the form. On the tape sealing the shipping container, the collection site person shall sign and enter the date specimens were sealed in the shipping container for shipment. The collection site person shall ensure that the chain of custody documentation is enclosed in each container sealed for shipment to the drug testing laboratory. Since specimens and documentation are sealed in shipping containers that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site.

(i) **Failure to cooperate.** If the employee refuses to cooperate with the collection process, the collection site person shall inform the employer representative and shall document the non-cooperation on the drug testing custody and control form.

(j) **Employee requiring medical attention.** If the sample is being collected from an employee in need of medical attention (e.g., as part of a post-accident test given in an emergency medical facility), necessary medical attention shall not be delayed in order to collect the specimen.

(k) **Use of chain of custody form.** A chain of custody form (and a laboratory internal chain of custody document, where applicable), shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the form each time a specimen is handled or transferred and every individual in the chain of custody shall be identified. Since specimens and documentation are sealed in shipping containers that would indicate

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any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site. Every effort shall be made to minimize the number of persons handling specimens.

§40.27 Laboratory personnel.

(a) **Day-to-day management.** (1) The laboratory shall have a qualified individual to assume professional, organizational, educational, and administrative responsibility for the laboratory's urine drug testing facility.

(2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are:

(i) Certification as a laboratory director by a State in forensic or clinical laboratory toxicology; or

(ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education in biology, chemistry, and pharmacology or toxicology; or

(iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology; and

(iv) In addition to the requirements in paragraph (a)(2)(i), (ii), or (iii) of this section, minimum qualifications also require;

(A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse, and

(B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

(3) This individual shall be engaged in and responsible for the day-to-day management of the drug testing laboratory even where another individual has overall responsibility for an entire multi-specialty laboratory.

(4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of the drug testing laboratory. He or she shall assure the continued competency of laboratory personnel by documenting their in-service training, reviewing their work performance, and verifying their skills.

(5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible individual whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the drug testing laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in §40.29 (n)(1).)

(6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.

(7) This individual shall be responsible for taking all remedial actions necessary to maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that sample results are not reported until all corrective actions have been taken and he or she can assure that the tests results provided are accurate and reliable.

(b) **Test validation.** The laboratory's urine drug testing facility shall have a qualified individual(s) who reviews all pertinent data and quality control results in order to attest to the validity of the laboratory's test reports. A laboratory may designate more than one person to perform this function. This individual(s) may be any employee who is qualified to be responsible for day-to-day management or operation of the drug testing laboratory.

(c) **Day-to-day operations and supervision of analysts.** The laboratory's urine drug testing facility shall have an individual to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

(d) **Other personnel.** Other technicians or non-technical staff shall have the necessary training and skills for the tasks assigned.

(e) **Training.** The laboratory's urine drug testing program shall make available continuing education programs to meet the needs of laboratory personnel.

(f) **Files.** Laboratory personnel files shall include: resume of training and experience, certification or license if any; references; job descriptions; records of performance evaluation and advancement; incident

reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

§40.29 Laboratory analysis procedures.

(a) **Security and chain of custody.** (1) Drug testing laboratories shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory process or to areas where records are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. With the exception of personnel authorized to conduct inspections on behalf of Federal agencies for which the laboratory is engaged in urine testing or on behalf of DHHS, all authorized visitors and maintenance and service personnel shall be escorted at all times. Documentation of individuals accessing these areas, dates, and time of entry and purpose of entry must be maintained.

(2) Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain of custody forms for those specimens or aliquots as they are received.

(b) **Receiving.** (1)(i) When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the employer's chain of custody forms attached to the shipment shall be immediately reported to the employer and shall be noted on the laboratory's chain of custody form which shall accompany the specimens while they are in the laboratory's possession.

(ii) Where the employer has used the split sample method, and the laboratory observes that the split specimen is untestable, inadequate, or unavailable for testing, the laboratory shall nevertheless test the primary specimen. The laboratory does not inform the MRO or the employer of the untestability, inadequacy, or unavailability of the split specimen until and unless the primary specimen is a verified positive test and the MRO has informed the laboratory that the employee has requested a test of the split specimen.

(2) In situations where the employer uses the split sample collection method, the laboratory shall log in the split specimen, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary specimen is negative, the laboratory may discard the split specimen. If the result of the test of the primary specimen is positive, the labora-

tory shall retain the split specimen in frozen storage for 60 days from the date on which the laboratory acquires it (see paragraph (h) of this section). Following the end of the 60-day period, if not informed by the MRO that the employee has requested a test of the split specimen, the laboratory may discard the split specimen.

(3) When directed in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GC/MS confirmation shall be conducted without regard to the cutoff levels of §40.29(f). The split specimen shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split specimen (or longer if litigation concerning the test is pending).

(c) **Short-term refrigerated storage.** Specimens that do not receive an initial test within 7 days of arrival at the laboratory shall be placed in secure refrigeration units. Temperatures shall not exceed 6°C. Emergency power equipment shall be available in case of prolonged power failure.

(d) **Specimen processing.** Laboratory facilities for urine drug testing will normally process specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests, every batch shall contain an appropriate number of standards for calibrating the instrumentation and a minimum of 10 percent controls. Both quality control and blind performance test samples shall appear as ordinary samples to laboratory analysts.

(e) **Initial test.** (1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

	Initial test cutoff levels (ng/ml)
Marijuana metabolites	50
Cocaine metabolites	300
Opiate metabolites	*300
Phencyclidine	25
Amphetamines	1,000

*25 ng/ml if immunoassay specific for free morphine.

(2) These cutoff levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations.

(f) **Confirmatory test.** (1) All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff levels listed in this paragraph for each drug. All confirmations shall be by quantitative analysis. Concentrations that exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

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	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite ¹	15
Cocaine metabolite ²	150
Opiates:	
Morphine	300
Codeine	300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine ³	500

¹Delta-9-tetrahydrocannabinol-9-carboxylic acid.

²Benzoylcegonine.

³Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

(2) These cutoff levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations.

(g) **Reporting results.** (1) The laboratory shall report test results to the employer's Medical Review Officer within an average of 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual. The report shall identify the drugs/metabolites tested for, whether positive or negative, the specimen number assigned by the employer, and the drug testing laboratory specimen identification number (accession number).

(2) The laboratory shall report as negative all specimens that are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive shall be reported positive for a specific drug.

(3) The Medical Review Officer may request from the laboratory and the laboratory shall provide quantitation of test results. The MRO shall report whether the test is positive or negative, and may report the drug(s) for which there was a positive test, but shall not disclose the quantitation of test results to the employer. *Provided*, that the MRO may reveal the quantitation of a positive test result to the employer, the employee, or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the employee and arising from a verified positive drug test.

(4) The laboratory may transmit results to the Medical Review Officer by various electronic means (for example, teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone. The laboratory and employer must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

(5) The laboratory shall send only to the Medical Review Officer the original or a certified true copy of the drug testing custody and control form (part 2), which, in the case of a report positive for drug use, shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports, and attached to which shall be a copy of the test report.

(6) The laboratory shall provide the employer an aggregate quarterly statistical summary of urinalysis testing of the employer's employees. Laboratories may provide the report to a consortium provided that the laboratory provides employer-specific data and the consortium forwards the employer-specific data to the respective employers within 14 days of receipt of the laboratory report. The laboratory shall provide the report to the employer or consortium not more than 14 calendar days after the end of the quarter covered by the summary. Laboratory confirmation data only shall be included from test results reported within that quarter. The summary shall contain only the following information:

- (i) Number of specimens received for testing;
- (ii) Number of specimens screened positive for—
 - (A) Marijuana metabolite
 - (B) Cocaine metabolite
 - (C) Opiates
 - (D) Phencyclidine
 - (E) Amphetamine;
- (iii) Number of specimens for which a test was not performed.

Quarterly reports shall not contain personal identifying information or other data from which it is reasonably likely that information about individuals' tests can be readily inferred. If necessary, in order to prevent disclosure of such data, the laboratory shall not send such a report until data are sufficiently aggregated to make such an inference unlikely. In any quarter in which a report is withheld for this reason, or because no testing was conducted, the laboratory shall so inform the consortium/employer in writing.

(7) The laboratory shall make available copies of all analytical results for employer drug testing programs when requested by DOT or any DOT agency with regulatory authority over the employer.

(8) Unless otherwise instructed by the employer in writing, all records pertaining to a given urine specimen shall be retained by the drug testing laboratory for a minimum of 2 years.

(h) **Long-term storage.** Long-term frozen storage (-20°C or less) ensures that positive urine specimens will be available for any necessary retest during administrative or disciplinary proceedings. Drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive, in their original labeled specimen bottles. Within this 1-year period, an employer (or other person designated in a DOT agency regulation) may request the laboratory to retain the specimen for an additional period of time, but if no such request is received the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens known to be under legal challenge for an indefinite period.

(i) **Retesting specimens.** Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite.

(j) **Subcontracting.** Drug testing laboratories shall not subcontract and shall perform all work with their own personnel and equipment. The laboratory must be

capable of performing testing for the five classes of drugs (marijuana, cocaine, opiates, phencyclidine and amphetamines) using the initial immunoassay and confirmatory GC/MS methods specified in this part. This paragraph does not prohibit subcontracting of laboratory analysis if specimens are sent directly from the collection site to the subcontractor, the subcontractor is a laboratory certified by DHHS as required in this part, the subcontractor performs all analysis and provides storage required under this part, and the subcontractor is responsible to the employer for compliance with this part and applicable DOT agency regulations as if it were the prime contractor.

(k) **Laboratory facilities.** (1) Laboratory facilities shall comply with applicable provisions of any State licensing requirements.

(2) Laboratories certified in accordance with DHHS Guidelines shall have the capability, at the same laboratory premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

(l) **Inspections.** The Secretary, a DOT agency, any employer utilizing the laboratory, DHHS or any organization performing laboratory certification on behalf of DHHS reserves the right to inspect the laboratory at any time. Employer contracts with laboratories for drug testing, as well as contracts for collection site services, shall permit the employer and the DOT agency of jurisdiction (directly or through an agent) to conduct unannounced inspections.

(m) **Documentation.** The drug testing laboratories shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2-year period may be extended upon written notification by a DOT agency or by any employer for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain of custody documents; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data. The laboratory shall maintain documents for any specimen known to be under legal challenge for an indefinite period.

(n) **Additional requirements for certified laboratories.** — (1) **Procedure manual.** Each laboratory shall have a procedure manual which includes the principles of each test preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of methods, cutoff values, mechanisms for reporting results, controls criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual.

(2) **Standards and controls.** Laboratory standards shall be prepared with pure drug standards which are properly labeled as to content and concentration. The standards shall be labeled with the

following dates: when received; when prepared or opened; when placed in service; and expiration date.

(3) **Instruments and equipment.** (i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.

(ii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks and instructions for major trouble shooting and repair. Records shall be available on preventive maintenance.

(4) **Remedial actions.** There shall be written procedures for the actions to be taken when systems are out of acceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.

(5) **Personnel available to testify at proceedings.** A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against an employee when that proceeding is based on positive urinalysis results reported by the laboratory.

(6) The laboratory shall not enter into any relationship with an employer's MRO that may be construed as a potential conflict of interest or derive any financial benefit by having an employer use a specific MRO.

§40.31 Quality assurance and quality control.

(a) **General.** Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody security and reporting of results, initial and confirmatory testing and validation of analytical procedures. Quality assurance procedures shall be designed, implemented and reviewed to monitor the conduct of each step of the process of testing for drugs.

(b) **Laboratory quality control requirements for initial tests.** Each analytical run of specimens to be screened shall include:

- (1) Urine specimens certified to contain no drug;
- (2) Urine specimens fortified with known standards; and
- (3) Positive controls with the drug or metabolite at or near the cutoff level.

In addition, with each batch of samples a sufficient number of standards shall be included to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known standards, those values will be used to calculate sample data. Implementation of procedures to ensure the carryover does not contaminate the testing of an individual's specimen shall be documented. A minimum of 10 percent of all test samples shall be quality control specimens. Laboratory quality control samples, prepared

from spiked urine samples of determined concentration shall be included in the run and should appear as normal samples to laboratory analysts. One percent of each run, with a minimum of at least one sample, shall be the laboratory's own quality control samples.

(c) **Laboratory quality control requirements for confirmation tests.** Each analytical run of specimens to be confirmed shall include:

- (1) Urine specimens certified to contain no drug;
- (2) Urine specimens fortified with known standards; and
- (3) Positive controls with the drug or metabolite at or near the cutoff level. The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall also be documented.

(d) **Employer blind performance test procedures.**

(1) Each employer covered by DOT agency drug testing regulations shall use blind testing quality control procedures as provided in this paragraph.

(2) Each employer shall submit three blind performance test specimens for each 100 employee specimens it submits, up to a maximum of 100 blind performance test specimens submitted per quarter. A DOT agency may increase this per quarter maximum number of samples if doing so is necessary to ensure adequate quality control of employers or consortiums with very large numbers of employees.

(3) For employers with 2000 or more covered employees, approximately 80 percent of the blind performance test samples shall be blank (i.e., containing no drug or otherwise as approved by a DOT agency) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the employer is testing. This paragraph shall not be construed to prohibit spiking of other (potentially interfering) compounds, as technically appropriate, in order to verify the specificity of a particular assay.

(4) Employers with fewer than 2000 covered employees may submit blind performance test specimens as provided in paragraph (d)(3) of this section. Such employers may also submit only blank samples or may submit two separately labeled portions of a specimen from the same non-covered employee.

(5) Consortiums shall be responsible for the submission of blind samples on behalf of their members. The blind sampling rate shall apply to the total number of samples submitted by the consortium.

(6) The DOT agency concerned shall investigate, or shall refer to DHHS for investigation, any unsatisfactory performance testing result and, based on this investigation, the laboratory shall take action to correct the cause of the unsatisfactory performance test result. A record shall be made of the investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individual responsible for the day-to-day management and operation of the drug testing laboratory. Then the

DOT agency shall send the document to the employer as a report of the unsatisfactory performance testing incident. The DOT agency shall ensure notification of the finding to DHHS.

(7) Should a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.), the employer shall promptly notify the DOT agency concerned. The DOT agency and the employer shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future, and, if there is reason to believe the error could have been systemic, the DOT agency may also require review and reanalysis of previously run specimens.

(8) Should a false positive error occur on a blind performance test specimen and the error is determined to be a technical or methodological error, the employer shall instruct the laboratory to submit all quality control data from the batch of specimens which include the false positive specimen to the DOT agency concerned. In addition, the laboratory shall retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for day-to-day management of the laboratory's urine drug testing. The DOT agency concerned may require an on-site review of the laboratory which may be conducted unannounced during any hours of operation of the laboratory. Based on information provided by the DOT agency, DHHS has the option of revoking or suspending the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

§40.33 Reporting and review of results.

(a) **Medical review officer shall review confirmed positive results.** (1) An essential part of the drug testing program is the final review of confirmed positive results from the laboratory. A positive test result does not automatically identify an employee/applicant as having used drugs in violation of a DOT agency regulation. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer (MRO) prior to the transmission of the results to employer administrative officials. The MRO review shall include review of the chain of custody to ensure that it is complete and sufficient on its face.

(2) The duties of the MRO with respect to negative results are purely administrative.

(b) **Medical review officer—qualifications and responsibilities.** (1) The MRO shall be a licensed physician with knowledge of substance abuse disorders and may be an employee of a transportation employer or a private physician retained for this purpose.

(2) [Removed and reserved]

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(3) The role of the MRO is to review and interpret confirmed positive test results obtained through the employer's testing program. In carrying out this responsibility, the MRO shall examine alternate medical explanations for any positive test result. This action may include conducting a medical interview and review of the individual's medical history, or review of any other relevant biomedical factors. The MRO shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The MRO shall not, however, consider the results or urine samples that are not obtained or processed in accordance with this part.

(c) **Positive test result.** (1) Prior to making a final decision to verify a positive test result for an individual, the MRO shall give the individual an opportunity to discuss the test result with him or her.

(2) The MRO shall contact the individual directly, on a confidential basis, to determine whether the employee wishes to discuss the test result. A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee. Except as provided in paragraph (c)(5) of this section, the MRO shall talk directly with the employee before verifying a test as positive.

(3) If, after making all reasonable efforts and documenting them, the MRO is unable to reach the individual directly, the MRO shall contact a designated management official who shall direct the individual to contact the MRO as soon as possible. If it becomes necessary to reach the individual through the designated management official, the designated management official shall employ procedures that ensure, to the maximum extent practicable, the requirement that the employee contact the MRO is held in confidence.

(4) If, after making all reasonable efforts, the designated management official is unable to contact the employee, the employer may place the employee on temporary medically unqualified status or medical leave.

(5) The MRO may verify a test as positive without having communicated directly with the employee about the test in three circumstances:

(i) The employee expressly declines the opportunity to discuss the test;

(ii) Neither the MRO nor the designated employer representative, after making all reasonable efforts, has been able to contact the employee within 14 days of the date on which the MRO receives the confirmed positive test result from the laboratory;

(iii) The designated employer representative has successfully made and documented a contact with the employee and instructed the employee to contact the MRO (see paragraphs (c)(3) and (c)(4) of this section), and more than five days have passed since the date the employee was successfully contacted by the designated employer representative.

(6) If a test is verified positive under the circumstances specified in paragraph (c)(5) (ii) or (iii) of this section, the employee may present to the MRO information documenting that serious illness, injury, or other circumstances unavoidably prevented the em-

ployee from being contacted by the MRO or designated employer representative (paragraph (c)(5)(ii) of this section) or from contacting the MRO (paragraph (c)(5)(iii) of this section) within the times provided. The MRO, on the basis of such information, may reopen the verification, allowing the employee to present information concerning a legitimate explanation for the confirmed positive test. If the MRO concludes that there is a legitimate explanation, the MRO declares the test to be negative.

(7) Following verification of a positive test result, the MRO shall, as provided in the employer's policy, refer the case to the employer's employee assistance or rehabilitation program, if applicable, to the management official empowered to recommend or take administrative action (or the official's designated agent), or both.

(d) **Verification for opiates; review for prescription medication.** Before the MRO verifies a confirmed positive result for opiates, he or she shall determine that there is clinical evidence — in addition to the urine test — of unauthorized use of any opium, opiate, or opium derivative (e.g., morphine/codeine). (This requirement does not apply if the employer's GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine.)

(e) In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee's having been informed of a verified positive test, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample. The MRO may also direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHHS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer and the employee.

(f)(1) In situations in which the employer uses the split sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a test of the split specimen, if the test is verified as positive. If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis. If the analysis of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report cancellation and the reasons for it to the DOT, the employer, and the employee.

(2) If the analysis of the split specimen is reconfirmed by the second laboratory for the presence of the

drug(s) or drug metabolites(s), the MRO shall notify the employer and employee of the results of the test.

(g) If an employee has not contacted the MRO within 72 hours, as provided in paragraphs (e) and (f) of this section, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from timely contacting the MRO. If the MRO concludes that there is a legitimate explanation for the employee's failure to contact the MRO within 72 hours, the MRO shall direct that the reanalysis of the primary specimen or analysis of the split specimen, as applicable, be performed.

(h) When the employer uses the split sample method of collection, the employee is not authorized to request a reanalysis of the primary specimen as provided in paragraph(e) of this section.

(i) **Disclosure of information.** Except as provided in this paragraph, the MRO shall not disclose to any third party medical information provided by the individual to the MRO as a part of the testing verification process.

(1) The MRO may disclose such information to the employer, a DOT agency or other Federal safety agency, or a physician responsible for determining the medical qualification of the employee under an applicable DOT agency regulation, as applicable, only if—

(i) An applicable DOT regulation permits or requires such disclosure;

(ii) In the MRO's reasonable medical judgment, the information could result in the employee being determined to be medically unqualified under an applicable DOT agency rule; or

(iii) In the MRO's reasonable medical judgment, in a situation in which there is no DOT agency rule establishing physical qualification standards applicable to the employee, the information indicates that continued performance by the employee of his or her safety-sensitive function could pose a significant safety risk.

(2) Before obtaining medical information from the employee as part of the verification process, the MRO shall inform the employee that information may be disclosed to third parties as provided in this paragraph and the identity of any parties to whom information may be disclosed.

§40.35 Protection of employee records.

Employer contracts with laboratories shall require that the laboratory maintain employee test records in confidence, as provided in DOT agency regulations. The contracts shall provide that the laboratory shall disclose information related to a positive drug test of an individual to the individual, the employer, or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from a certified positive drug test.

§40.37 Individual access to test and laboratory certification results.

Any employee who is the subject of a drug test conducted under this part shall, upon written request, have access to any records relating to his or her drug

test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings.

§40.39 Use of certified laboratories.

(a) Except as provided in paragraph (b) of this section, employers subject to this part shall use only laboratories certified under the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs," April 11, 1988, and subsequent amendments thereto.

(b) Employers subject to this part may also use laboratories located outside the United States if—

(1) The Department of Transportation, based on a written recommendation from DHHS, has certified the laboratory as meeting DHHS laboratory certification standards or deemed the laboratory fully equivalent to a laboratory meeting DHHS laboratory certification standards; or

(2) The Department of Transportation, based on a written recommendation from DHHS, has recognized a foreign certifying organization as having equivalent laboratory certification standards and procedures to those of DHHS, and the foreign certifying organization has certified the laboratory, pursuant to those equivalent standards and procedures.

Subpart C — Alcohol Testing

§40.51 The breath alcohol technician.

(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT he or she is using and in the alcohol testing procedures of this part.

(1) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.

(2) Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.

(3) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) he/she will use.

(4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(5) The BAT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

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(6) The employer or its agent shall establish documentation of the training and proficiency test of each BAT it uses to test employees, and maintain the documentation as provided in §40.83.

(b) A BAT-qualified supervisor of an employee may conduct the alcohol test for that employee only if another BAT is unavailable to perform the test in a timely manner. A supervisor shall not serve as a BAT for the employee in any circumstance prohibited by a DOT operating administration regulation.

(c) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under Department of Transportation alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT or non-evidential alcohol screening device that was used for the test.

§40.53 Devices to be used for breath alcohol tests.

(a) For screening tests, employers shall use only EBTs. When the employer uses for a screening test an EBT that does not meet the requirements of paragraphs (b)(1) through (3) of this section, the employer shall use a log book in conjunction with the EBT (see §40.59(c)).

(b) For confirmation tests, employers shall use EBTs that meet the following requirements:

(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b)(2) and (3) of this section.

(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.

(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer's name for the device, the device's serial number, and the time of the test.

(4) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.

(5) EBTs shall be capable of the following operations:

- (i) Testing an air blank prior to each collection of breath; and
- (ii) Performing an external calibration check.

§40.55 Quality assurance plans for EBTs.

(a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.

(1) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA "Conforming Products List of Calibrating Units for Breath Alcohol Tests."

(2) The plan shall specify the minimum intervals for performing external calibration checks of the de-

vice. Intervals shall be specified for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use).

(3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.

(4) The plan shall specify inspection, maintenance, and calibration requirements and intervals for the device.

(5) For a plan to be regarded as valid, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.

(b) The employer shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol screening or confirmation testing subject to this part.

(1) The employer shall ensure that external calibration checks of each EBT are performed as provided in the QAP.

(2) The employer shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in the QAP. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has had an external calibration check resulting in a reading within the tolerances for the EBT.

(3) The employer shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. The employer shall also ensure that each BAT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.

(4) The employer shall maintain records of the external calibration checks of EBTs as provided in §40.83.

(c) When the employer is not using the EBT at an alcohol testing site, the employer shall store the EBT in a secure space.

§40.57 Locations for breath alcohol testing.

(a) Each employer shall conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results. All necessary equipment, personnel, and materials for breath testing shall be provided at the location where testing is conducted.

(b) An employer may use a mobile collection facility (e.g., a van equipped for alcohol testing) that meets the requirements of paragraph (a) of this section.

(c) No unauthorized persons shall be permitted access to the testing location when the EBT remains unsecured or, in order to prevent such persons from seeing or hearing a testing result, at any time when testing is being conducted.

(d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the employer or BAT shall

provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee's use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see §§40.61 through 40.65) is in progress.

§40.59 The breath alcohol testing form.

(a) Each employer shall use the breath alcohol testing form prescribed under this part. The form is found in Appendix A to this subpart. Employers may not modify or revise this form, except that a form directly generated by an EBT may omit the space for affixing a separate printed result to the form.

(b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 (white) shall be transmitted to the employer. Copy 2 (green) shall be provided to the employee. Copy 3 (blue) shall be retained by the BAT. Except for a form generated by an EBT, the form shall be 8½ by 11 inches in size.

§40.61 Preparation for breath alcohol testing.

(a) When the employee enters the alcohol testing location, the BAT will require him or her to provide positive identification (e.g., through use of a photo I.D. card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

§40.63 Procedures for screening tests.

(a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

(b) An individually-sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer's instructions.

(c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(d)(1) If the EBT does not meet the requirements of §40.53(b)(1) through (3), the BAT shall ensure, before a screening test is administered to each employee, that he or she and the employee read the sequential test number displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, and time in Step # of the form.

(2) If the EBT does not meet the requirements of §40.53(b)(1) through (3), the BAT and the employee shall take the following steps:

(i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form.

(ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the log book. The employee shall initial the log book entry.

(3) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(4) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(e)(1) In any case in which the result of the screening test is a breath alcohol concentration of less than 0.02, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the employer in a confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by §40.81.

(3) If the employee does not sign the certification in Step 4 of the form for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign in the "Remarks" section of the form.

(4) If a test result printed by the EBT (See paragraph (d)(3) or (d) (4) of this section) does not match the displayed result, or if a sequential test number printed by the EBT does not match the sequential test number displayed by the EBT prior to the screening test (see paragraph (d)(1) of this section), the BAT shall note the disparity in the "Remarks" section. Both the employee and the BAT shall initial and sign the notation. In accordance with §40.79, the test is invalid and the employee shall be so advised.

(f) If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test shall be performed as provided in §40.65.

(g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

(h) If the confirmation test will be conducted at a different site from the screening test, the employer or its agent shall ensure that—

(1) The employee is advised against taking any of the actions mentioned in the first sentence of §40.65(b) of this Part;

(2) The employee is advised that he or she must not drive, perform safety-sensitive duties, or operate heavy equipment, as noted in Block 4 of the alcohol testing form; and

(3) The employee is under observation of a BAT, STT, or other employer personnel while in transit from the screening test site to the confirmation test site.

§40.65 Procedures for confirmation tests.

(a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of §40.61.

(b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth,

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and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test, and shall not be less than 15 minutes. The confirmation test shall be conducted within 30 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (i.e., to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the "Remarks" section of the form. If the BAT conducts the confirmation test more than 30 minutes after the result of the screening test has been obtained, the BAT shall note in the "Remarks" section of the form the time that elapsed between the screening and confirmation tests and the reason why the confirmation test could not be conducted within 30 minutes of the screening test.

(c)(1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the "Remarks" section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of §40.63 (a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument, which shall be taken out of service. However, testing may proceed on another instrument. Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is completed and the EBT is found to be within tolerance limits.

(e) Before the confirmation test is administered for each employee, the BAT shall ensure that he or she and the employee read the sequential test number displayed by the EBT.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g)(1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(h)(1) Following the completion of the test, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign in the "Remarks" section.

(3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, or if a sequential test number printed by the EBT does not match the sequential test number displayed by the EBT prior to the confirmation test (see paragraph (e) of this section), the BAT shall note the disparity in the "Remarks" section. Both the employee and the BAT shall initial and sign the notation. In accordance with §40.79, the test is invalid and the employee shall be so advised.

(i) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate one or more employer representatives for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BATs to the employer concerning the alcohol testing results of employees shall be to a designated employer representative.

(2) Such transmission may be in writing (the employer copy (Copy 1) of the breath alcohol testing form), in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (e.g., by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer's copy of the breath alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by §40.81.

§40.67 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the employer.

(b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of §40.53(b) or in the case of a confirmation test).

§40.69 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the "Remarks" section of the breath alcohol testing form and immediately inform the employer.

(d) If the employee attempts and fails to provide an adequate amount of breath, the employer shall proceed as follows:

(1) [Reserved]

(2) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's medical ability to provide an adequate amount of breath.

(i) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(ii) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (d)(2)(i) of this section, the employee's failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

§§40.71 - 40.77 [Reserved]

§40.79 Invalid tests.

(a) A breath alcohol test shall be invalid under the following circumstances:

(1) The next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this event, every test result of 0.02 or above obtained on the device since the last valid external calibration check shall be invalid;

(2) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in §40.65 (b);

(3) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to the administration of the test, as provided in §40.65;

(4) The BAT does not sign the form as required by §§40.63 and 40.65;

(5) The BAT has failed to note on the remarks section of the form that the employee has failed or re-

fused to sign the form following the recording or printing on or attachment to the form of the test result;

(6) An EBT fails to print a confirmation test result; or

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) [Reserved]

§40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer's alcohol misuse prevention program. The information shall include name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer's administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's written request.

(h) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under the requirements of this part, or from the employer's deter-

mination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information is permitted only in accordance with the terms of the employee's consent.

§40.83 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer's compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by §40.59(c).

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in §40.81.

Subpart D — Non-Evidential Alcohol Screening Devices

§40.91 Authorization for use of non-evidential alcohol screening devices.

Non-evidential alcohol screening tests, performed using screening devices included by the National Highway Traffic Safety Administration on its conforming products list for non-evidential screening devices, may be used in lieu of EBTs to perform screening tests required by operating administrations' alcohol testing regulations. Non-evidential screening devices may not be used for confirmation alcohol tests, which must be conducted using EBTs as provided in Subpart C of this Part.

§40.93 The screening test technician.

(a) Anyone meeting the requirements of this Part to be a BAT may act as a screening test technician (STT), provided that the individual has demonstrated proficiency in the operation of the non-evidential screening device he or she is using.

(b) Any other individual may act as an STT if he or she successfully completes a course of instruction concerning the procedures required by this Part for conducting alcohol screening tests. Only the Department of Transportation model course, or a course of instruction determined by the Department of Transportation's Office of Drug Enforcement and Program Com-

pliance to be equivalent to it, may be used for this purpose.

(c) With respect to any non-evidential screening device involving changes, contrasts, or other readings that are indicated on the device in terms of color, STTs shall, in order to be regarded as proficient, be able to discern correctly these changes, contrasts or readings.

(d) The STT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(e) The employer or its agent shall document the training and proficiency of each STT it uses to test employees and maintain the documentation as provided in §40.83.

(f) The provisions of §40.51(b) and (c); §40.57; §40.59; §40.61; §40.63 (e)(1)-(2), (f), (g), and (h); §40.69; and §40.81; and other provisions, as applicable, of this Part apply to STTs as well as to BATs.

§40.95 Quality assurance plans for non-evidential screening devices.

(a) In order to be used for alcohol screening tests subject to this part, a non-evidential screening device shall have an approved quality assurance plan (QAP) developed by the manufacturer and approved by the National Highway Traffic Safety Administration (NHTSA).

(1) The plan shall designate the method or methods to be used to perform quality control checks; the temperatures at which the non-evidential screening device shall be stored and used, as well as other environmental conditions (e.g., altitude, humidity) that may affect the performance of the device; and, where relevant, the shelf life of the device.

(2) The QAP shall prohibit the use of any device that does not pass the specified quality control checks or that has passed its expiration date.

(b) The manufacturers' instructions on or included in the package for each saliva testing device shall include directions on the proper use of the device, the time frame within which the device must be read and the manner in which the reading is made.

(c) The employer and its agents shall comply with the QAP and manufacturer's instructions for each non-evidential screening device it uses for alcohol screening tests subject to this Part.

§40.97 Locations for non-evidential alcohol screening tests.

(a) Locations for non-evidential alcohol screening tests shall meet the same requirements set forth for breath alcohol testing in §40.57 of this Part.

(b) The STT shall supervise only one employee's use of a non-evidential screening device at a time. The STT shall not leave the alcohol testing location while the screening test procedure for a given employee is in progress.

§40.99 Testing forms.

STTs conducting tests using a non-evidential screening device shall use the alcohol testing form as provided in §40.59 and Appendix B of this Part for the screening test.

§40.101 Screening test procedure.

(a) The steps for preparation for testing shall be the same as provided for breath alcohol testing in §40.61 of this Part.

(b) The STT shall complete Step 1 on the form required by §40.99. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

(c) If the employer is using a non-evidential breath testing device, the STT shall follow the same steps outlined for screening tests using EBTs in §40.63.

(d) If the employer is using a saliva testing device, the STT shall take the following steps:

(1) The STT shall explain the testing procedure to the employee.

(2) The STT shall check the expiration date of the saliva testing device, show the date to the employee, and shall not use a device at any time subsequent to the expiration date.

(3) The STT shall open an individually sealed package containing the device in the presence of the employee.

(4) The STT shall offer the employee the opportunity to use the swab. If the employee chooses to use the swab, the STT shall instruct the employee to insert the absorbent end of the swab into the employee's mouth, moving it actively throughout the mouth for a sufficient time to ensure that it is completely saturated, as provided in the manufacturer's instructions for the device.

(5) If the employee chooses not to use the swab, or in all cases in which a new test is necessary because the device did not activate (see paragraph (d)(8) of this section), the STT shall insert the absorbent end of the swab into the employee's mouth, moving it actively throughout the mouth for a sufficient time to ensure that it is completely saturated, as provided in the manufacturer's instructions for the device. The STT shall wear a surgical grade glove while doing so.

(6) The STT shall place the device on a flat surface or otherwise in a position in which the swab can be firmly placed into the opening provided in the device for this purpose. The STT shall insert the swab into this opening and maintain firm pressure on the device until the device indicates that it is activated.

(7) If the procedures of paragraph (d)(3)-(d)(5) of this section are not followed successfully (e.g., the swab breaks, the STT drops the swab on the floor or another surface, the swab is removed or falls from the device before the device is activated), the STT shall discard the device and swab and conduct a new test using a new device. The new device shall be one that has been under the control of the employer or STT prior to the test. The STT shall note in the remarks section of the form the reason for the new test. In this

case, the STT shall offer the employee the choice of using the swab himself or herself or having the STT use the swab. If the procedures of paragraph (d)(3)-(d)(5) of this section are not followed successfully on the new test, the collection shall be terminated and an explanation provided in the remarks section of the form. A new test shall then be conducted, using an EBT for both the screening and confirmation tests.

(8) If the procedures of paragraph (d)(3)-(d)(5) of this section are followed successfully, but the device is not activated, the STT shall discard the device and swab and conduct a new test, in the same manner as provided in paragraph (d)(7) of this section. In this case, the STT shall place the swab into the employee's mouth to collect saliva for the new test.

(9) The STT shall read the result displayed on the device two minutes after inserting the swab into the device. The STT shall show the device and its reading to the employee and enter the result on the form.

(10) Devices, swabs, gloves and other materials used in saliva testing shall not be reused, and shall be disposed of in a sanitary manner following their use, consistent with applicable requirements.

(e) In the case of any screening test performed under this section, the STT, after determining the alcohol concentration result, shall follow the applicable provisions of §40.63 (e)(1)-(2), (f), (g), and (h). The STT shall also enter, in the "Remarks" section of the form, a notation that the screening test was performed using a non-evidential breath testing device or a saliva device, as applicable. Following completion of the screening test, the STT shall date the form and sign the certification in Step 3 of the form.

§40.103 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the alcohol testing form required by §40.99 (Step 2), to provide a breath or saliva sample, to provide an adequate amount of breath, or otherwise to cooperate in a way that prevents the completion of the testing process, shall be noted by the STT in the remarks section of the form. This constitutes a refusal to test. The testing process shall be terminated and the STT shall immediately notify the employer.

(b) If the screening test cannot be completed, for reasons other than a refusal by the employee, or if an event occurs that would invalidate the test, the STT shall, if practicable, immediately begin a new screening test, using a new testing form and, in the case of a test using a saliva screening device, a new device.

§40.105 Inability to provide an adequate amount of breath or saliva.

(a) If an employee is unable to provide sufficient breath to complete a test on a non-evidential breath testing device, the procedures of §40.69 apply.

(b) If an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (e.g., the employee does not provide sufficient saliva to activate the device), the STT, as provided in §40.101 of this Part, shall conduct a new test using a new device. If the employee refuses to complete the new test, the

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STT shall terminate testing and immediately inform the employer. This constitutes a refusal to test.

(c) If the new test is completed, but there is an insufficient amount of saliva to activate the device, STT shall immediately inform the employer, which shall immediately cause an alcohol test to be administered to the employee using an EBT.

§40.107 Invalid tests.

An alcohol test using a non-evidential screening device shall be invalid under the following circumstances:

(a) With respect to a test conducted on a saliva device—

(1) The result is read before two minutes or after 15 minutes from the time the swab is inserted into the device;

(2) The device does not activate;

(3) The device is used for a test after the expiration date printed on its package; or

(4) The STT fails to note in the remarks section of the form that the screening test was conducted using a saliva device;

(b) With respect to a test conducted on any non-evidential alcohol testing device, the STT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording on the form of the test result.

§40.109 Availability and disclosure of alcohol testing information about individual employees.

The provisions of §40.81 apply to records of non-evidential alcohol screening tests.

§40.111 Maintenance and disclosure of records concerning non-evidential testing devices and STTs.

Records concerning STTs and non-evidential testing devices shall be maintained and disclosed following the same requirements applicable to BATs and EBTs under §40.81 of this Part.

SENATE
L. 1000 NO. 12
DATE 3-11-97
BILL NO. HB 345

Amendments to House Bill No. 345
Third Reading Copy as Amended

For the Senate Committee on Labor and Employment Relations
March 11, 1997

1. Page 2, in Section 2
Following: "AVIATION," on line 2
Strike: "INTERSTATE"
Insert: "COMMERCIAL"

Rationale: Amendment 1. Current federal regulations under 49 CFR, Part 40 apply to both interstate and intrastate motor carriers. The proposed amendment will allow all commercial motor carriers, operating whether or not they operate interstate and/or intrastate to implement the drug and alcohol testing program under HB345 for non driver and other employees who are not now covered by federal regulations under 49 CFR, Part 40.

As the bill now reads, the definition of "Hazardous Work Environment" includes positions for which drug and alcohol testing is mandated by federal law, such as interstate motor carrier. This definition could be construed to not include an intrastate motor carrier who desires to test non driver employees.

The amendment would apply to all commercial motor carriers and clarify that an intrastate carrier as well as an interstate carrier may implement the drug and alcohol testing for other employees under HB345 who are not now covered under 49 CFR Part 40.

OCAW

Oil, Chemical & Atomic Workers
International Union, AFL-CIO



Dan C. Edwards
International Representative
P.O. Box 21635
Billings, MT 59104
406 / 669-3253

HB 345

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 13

DATE 3-11-97

BILL NO. HB 345

Statement of:

Dan C. Edwards, International Representative
Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO
P.O. Box 21635
Billings, MT 59104

406-669-3253

STATEMENT FOR THE SENATE LABOR and EMPLOYMENT RELATIONS COMMITTEE
March 11, 1997, 3:00 p.m.
TOM KEATING, CHAIR

Chairman Keating and Members of the Committee:

My name is Dan C. Edwards, International Representative for the Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW). OCAW represents nearly 1000 members in the State of Montana, including employees of the Conoco and Exxon refineries in Billings, the Cenex refinery in Laurel, the Stillwater Mining Company mine, mill and smelter in Nye and Columbus, the Montana Refining Company in Great Falls, and Montana Power Company in Cut Bank and Shelby.

This statement is to indicate OPPOSITION to HB 345.

First, I want to make it clear that OCAW does not support or condone the use of drugs or alcohol on-the-job, or coming to work under the influence of any substance. However, unless there is objective evidence that worker is impaired on-the-job, or that the worker's job performance is effected, workers have the same rights as any other Montanan against unwarranted intrusion into their private life away from the workplace.

Montana's current drug testing law does not need the major overhaul this bill proposes. We already have an excellent law which balances the legitimate interests of employers to have employees who are not impaired by drugs or alcohol, while at the same time protecting the individual privacy rights of employees as set forth in the Montana State Constitution. It is very likely that if this

bill passes as it is before this Committee, it will be challenged in State Court.

This bill is taken from a model bill, which comes out of a White House organization known as the "Institute for a Drug Free Workplace". Interesting that many legislators this session who are so concerned about the intrusion of the federal government, would seriously consider legislation that is being foisted on Montana by the feds. This is the same organization that fronted the original "bad" bill in 1991.

A brief review of the history of employee drug testing legislation in Montana might be useful:

1987:

Senator Paul Boylan introduced SB 338. The legislative history records the following: "He (Senator Boylan) told a story about his own dairy farm and how the milk inspectors tested the milk for a virus, and found it. They shut him down without a second opinion. Senator Boylan said when he got a second opinion, the milk tested negative for the virus. He felt a drug test of humans or animals should get a second change in the testing process." Montana's law still provides for that second test.

1989:

No changes.

1991:

Major changes were proposed. SB 138 by Senator Steinmetz came from the same federal source as I believe HB 345 did. Senator Towe introduced SB 31. Some of you may recall that I was very involved in the legislative process during the 1991 session. Steve Browning and I played a major role in working out the compromise which was eventually adopted. The final package was adopted in HB 110 (Gilbert) which allowed testing for intra-state truck drivers. A lot of effort went into forging this basis for the current law which both sides could live with. This was compromise legislation which afforded reasonable protections for both employer and employee alike.

1993:

No changes.

1995:

SB 201 was introduced by Senator Burnett. Again, a compromise was reached which expanded circumstances under which employees could be tested after an accident, but also provided some protection for

employees if it was later determined that the tested employee had nothing to do with the accident.

The bottom line is that through a lot of hard work, and in a spirit of cooperation, Montana enjoys an excellent employee drug testing law. There is absolutely no evidence or statistics which indicate that there is any need to now change this good law. There may be some employees that don't understand why some employees are tested under federal regulations, while others are covered under State law. But, I have never had an employee come to me and say they wanted, or were even willing, to be subject to random testing.

Another factor you should be aware of is that in 1985, when I first became involved in employee workplace drug testing, the number of laboratories doing drug testing were few, primarily forensic labs or labs set up for other purposes, hospitals, etc.. The number of companies in the drug testing business today has grown dramatically, making millions and millions of dollars either collecting or testing urine. Most didn't even exist 10 years ago. Today there are 70 drug testing laboratories on the DHHS Certified list alone.

I have included some examples of the enormous amount of money these labs take in (Attachment I). Note these are quarterly earnings. It doesn't take a rocket scientist to see that this is one of the major driving forces, regardless of the reasons put forth. The testimony before the House Business and Labor Committee (and Subcommittee meeting) of several individuals who stand to make a lot of money if random testing is allowed in the State of Montana, made it quite clear where their interests lie. You could almost see the dollar signs in their eyes. These were people who make their living collecting and testing urine, and a doctor who gets paid to review the results.

Another concern with HB 345 is the limitations on employer liability. If an employer is conducting a fair and reasonable drug testing program which meets the standards provided under Montana law, they need no special shield from liability. While I am not an attorney, I question whether this is in conflict with Section 40.25(f)(22)(ii) of 49 CFR Part 40, which provides in part, "The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others." This is a far cry from "malice".

Drug testing is expensive, and I assume the costs will continue to go up. Some Government Accounting Office figures that I have read puts the cost at \$73/test. Some other government figures I have seen place the cost for each positive test at \$77,000. The American Management Association has done a workplace drug testing survey for the past seven or eight years. I have reviewed a copy of the January 1992 survey. It shows a small decrease in the number of companies doing testing. Instituting drug testing increases costs dramatically. The average cost per testee in 1991 was \$41. One large company spent \$500,000 and found 8 positives, for an average of \$62,500 per positive. Thirteen additional companies spent more than \$10,000 per positive finding." I read in the January 1993 issue of Drug Detection Report that a number of companies have decided to deal with drug and alcohol abuse with education, supervisory training, and Employee Assistance Programs instead of testing. This has doubled over the past five years from 12% to 24% of respondents. I think we'll see more and more of that. (Please note the figures used in this paragraph were developed in 1993.)

Finally, and perhaps most importantly, the inclusion of random testing into an employer's drug testing policy would raise serious questions regarding the privacy provisions of the Montana State Constitution. I strongly suspect that court challenges would result from the adoption of any form of random testing. You should ask yourself if this really contributes anything to workplace safety. I submit it does not.

While I maintain that a DO NOT PASS is the best action for this unnecessary proposal, I would be more than happy to work with this committee or the sponsor to attempt to work out more acceptable language if that is desired. I understand that one of the concerns of the supporters of this bill is what might be considered as a "hazardous work environment". We are agreeable to defining that term so the law is clear as to who is covered; remembering that it only applies to pre-employment testing. Under current law any employer who has adopted a testing policy that conforms with CFR 49, Part 40, may test any employee if "the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use".

Thank you for your consideration of my testimony.

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Attachment I

PAGE -

Drug Detection Report

THE NEWSLETTER ON DRUG TESTING IN THE WORKPLACE

Truckers Seek Company-Based Relief in DOT Random Testing

The Interstate Truckload Carriers Conference (ITCC) has petitioned the Federal Highway Administration (FHWA) to ease its random drug and alcohol testing requirements for individual companies with low positive random rates.

Federal regulations say the FHWA may allow the trucking industry to test at lower rates than currently required if the industry as a whole has low positive random rates for two consecutive years.

The ITCC and four of its members said in the petition that a company-based system as opposed to an industry-based system should be used in order to reward those companies with good records. The current system, they said, is a "burden."

The ITCC said some of its members have records that — if met by the entire trucking industry — would entitle the industry to lower mandated random drug testing rates. Joining the petition were four such companies that, according to the petition, had two consecutive years of low positive rates for drugs. (Department of Transportation-regulated random alcohol testing for trucking began in 1995.)

The petition coincides with an attempt by another organization to get the Department of Transportation to alter its random drug and alcohol testing procedures —

November 20, 1996

but in a way that could result in more testing, not less. The Substance Abuse Program Administrators Association (SAPAA) wants the DOT to set random testing rates separately for regulated companies that are *contracted* to perform work for DOT-regulated employers. An unscientific poll conducted by SAPAA found, in general, that contracted workers get higher positive rates on random tests than regular employees. SAPAA

(continued on page 2)

On-Site Drug Test Producers Expand Their Product Lines

Manufacturers of on-site drug testing kits are expanding their product lines in an effort to offer a wider array of versatile, "user-friendly" tests that they hope will fit the needs of various customers.

Depending on the needs of the company interested in testing its employees or job applicants for illegal drugs, it can order products that test for a single drug, two drugs, or an entire array of drugs. Some manufacturers, reacting to market research indicating that customers use laboratory services because they do not want to get involved in handling employees' urine, have designed their products to reduce or eliminate that aspect of on-site testing.

Aside from the test kit itself, manufacturers of on-site systems have sought to differentiate themselves through the support services they can offer. One on-site company, for example, also owns a drug testing laboratory that can conduct confirmation tests of positive on-site results.

On-site products — which cannot be used for federally mandated drug testing — have some features in common. Each manufacturer has tried to make its products the easiest and clearest for nonspecialists to interpret. Quick turnaround, with results provided in minutes, is another common selling point.

Some manufacturers offer more than one product line of on-site drug test kits. EDITEK, Inc., announced earlier this month that it was expanding its VERDICT

See ATTACHMENT (continued on page 6)

Inside this issue...

Federal officials pledge to continue enforcing marijuana laws in California and Arizona.....	3
LabCorp takes two laboratories out of federally certified program.....	4
New Congress expected to deal with drug testing of Congressional employees.....	5
Lab official decries 'shortcomings' of on-site drug testing.....	7
In the Courts.....	8

Letters

To the Editor:

I read with great interest your article entitled "On-Site Drug Testing Kits Advance in Workplace Market" in your October 21, 1996, edition of *Drug Detection Report*. Unfortunately what I didn't see in the article was a description of any of the shortcomings an employer might face while using on-site testing. Those in the drug testing marketplace would be wise to balance time and convenience issues with the limitations. The most glaring weakness of on-site tests is that they provide no way of detecting the most common means of attempting to beat a urine drug test: diluting the urine by drinking large amounts of fluids before the specimen is collected. These kits do not determine if the specimen presented is actually urine. This raises the issue of a strong potential of employers making employment decisions based on false negative results.

In addition, collection site personnel, or company personnel if performing on-site, have less experience in identifying the wide array of adulterants that are used to avoid detection. *It is as important to correctly identify an adulterated specimen as it is to identify a positive specimen.* Certified laboratories have experience in detecting adulterated specimens and often have specific procedures which can identify the adulterant in a forensically defensible manner.

In general, objectivity is compromised when on-site testing is performed by employer personnel. Likewise, privacy and confidentiality can be compromised and offer potential for fraud. If the donor is known to the collector, and the test is performed in the presence of the donor, the collector knows the screen positive result. In laboratory testing, the collector is not likely to learn the result and the laboratory most often does not have the name of the donor, only identifying numbers. This can put the collector in the tempting position of revealing to others the results of the initial test, which might eventually fail to be confirmed as these are screens (presumptive positives). A presumptive positive also does not account for donors who have a legitimate medical explanation. There is also potential for collectors to be approached by donors to call the test negative for financial remuneration, a bribe.

Specimens which are positive for drugs that are near the cut-off concentration are more likely to be reported as negative by this technology than when the test is performed in a laboratory with calibrated and

controlled instrumentation, if a full amount of specimen is not delivered.

Many in the industry feel that on-site testing could tempt employers to perform screen-only testing, accepting the results of unconfirmed screen tests (presumptive positives) and not spending the extra time and effort to get confirmations, particularly when the testing is for pre-employment purposes. No one should be denied a job based on a screen-only, unconfirmed positive result.

On-site testing may create greater legal exposure and liability to companies who use their own employees or to collection sites who read these test results.

These issues have significant implications for anyone using on-site testing for decisions in the employment arena. It is my understanding that many of these kits received initial FDA approval for use in emergency medical facilities and not for employment drug testing.

[David G. Evans, a proponent of on-site drug testing quoted in the article,] would have us believe that it would be acceptable to compromise confidentiality not only by having an employee of the company read the test result but also an additional union representative observe the process....

[Michael A. Terretti, executive vice president of Medtox,] would have us believe that "98 percent of samples sent to laboratories are negative." If the positivity rate in the private sector is between 6 and 7 percent, then Mr. Terretti's math is a bit off.

Richard A. Etter, Ph.D., CHE, CMHA
Vice President/Occupational Testing
ARUP Laboratories
Salt Lake City, Utah, Nov. 8, 1996

Briefly...

● EDITEK, Inc., a publicly traded provider of drug testing products and services, has scheduled its annual meeting of shareholders for Dec. 19 in Minneapolis. The Burlington, N.C.-based company had postponed a previously scheduled annual meeting.

● PharmChem Laboratories, Inc., reported quarterly sales of \$10,631,000 and a "return to profitability" in the quarter ended Sept. 30. "The return to profitability in the third quarter was the result of reduced operating costs in the lab and higher average selling prices," said Joe Halligan, the company's president and chief executive officer. □

Julie Murdoch Leaves FAA And Joins Bensinger, DuPont

Julie Murdoch, a drug testing official with the Federal Aviation Administration, has left the government and joined the management consulting firm Bensinger, DuPont and Associates.

The firm, which has offices in Chicago and Rockville, Md., announced last month that Ms. Murdoch is its new director of DOT testing programs. In that capacity, the announcement said, she will be involved in providing consulting services for all aspects of Department of Transportation drug testing, with emphasis on FAA regulations.

Ms. Murdoch served with the FAA's Drug Abatement Division, where she was manager of the Special Projects Branch. She is credited with involvement in the drafting, preparation, and interpretation of regulations for the aviation industry and other transportation modes.

She was the United States representative to an international study group of substance abuse in aviation established by the International Civil Aviation Organization.

Before joining the FAA in 1990, Ms. Murdoch, a lawyer, served as a military judge advocate and as a management consultant. □

Letters

To the Editor:

Mr. Donald E. Veraska has misquoted me in his article titled "Competition Leads to Tensions Between Labs and Administrators" (*Drug Detection Report*, Aug. 20). On page six, paragraph 3, I am quoted as believing that the answer to Lab/MRO/TPA competition is either a class action suit against the labs or individual suits against the labs for restraint of trade. I wish it to be made very clear that *I did not tell Mr. Veraska that I thought this was the answer*. I did say that I have heard that there have been some TPAs within the industry who have discussed these two possibilities.

What I do believe is that, in the long run, it will be the DOT who will have to confront and decide the issue.

Ira Jane Hurst
Ira Jane Hurst & Associates
Lafayette, La., Aug. 26, 1996

Briefly...

- The Institute for a Drug-Free Workplace has established a site on the World Wide Web. Among other things, the site enables members, customers, and other interested parties to electronically order publications and request membership information and other information. Among some of the information contained in the site are the institute's policy statement, biographies of staff members, a catalog of publications, and news about the institute. The institute also plans to have links to other sites. The address of the site is <http://www.drugfreeworkplace.org>. For more information, call Daryl G. Grecich at the institute at (202) 842-7400.

- The Substance Abuse Program Administrators Association's last regional meeting for 1996 is scheduled for Nov. 15 in Durham, N.C. The all-day meeting will be held at the Durham Hilton. Federal officials representing the Department of Transportation, the Department of Defense, the Department of Energy, and the Nuclear Regulatory Commission are scheduled to give presentations. In addition, representatives of companies that are regulated by those agencies also are scheduled to speak. The registration fee is \$145 for association members and \$195 for non-members. For further information, contact the association at (847) 699-1666. The association's other regional meeting for this year took place in July.

- The annual conference of the Society of Forensic Toxicologists is scheduled for Oct. 14-18 in Denver, at the Denver Marriott Tech Center. The date and city given in a recent issue of *Drug Detection Report* referred to the 1997 annual conference. For further information, contact Robert Zentl at (303) 691-4700.

- PharmChem Laboratories, Inc., a drug testing lab headquartered in Menlo Park, Calif., reported sales of \$10,771,000 for the second quarter ended June 30, an 11 percent increase over sales for the comparable period in 1995. For the six months ended June 30, 1996, sales were \$20,638,000, which was 11 percent higher than for the same time period in 1995. The company attributed the increases primarily to an increase in the number of specimens analyzed.

- Scintrex, Inc., based in Toronto, has introduced a new handheld narcotic detection system called the NDS-2000. The device, which weighs less than 10 pounds, can be held in the hand and is capable of detecting cocaine, heroin, marijuana, amphetamines, and methamphetamine on surfaces, the company said. □

Collection Site Association Urges Voluntary Training

The National Association of Collection Sites (NACS), which represents 1,600 members of the drug collection industry, wants the Department of Transportation to call for better education, training, and industry initiatives to improve collections of urine samples for drug tests.

The association has postponed for a month or two adoption of the final version of an accreditation program for drug collection sites, said Executive Director Carolyn Koke, because member firms asked for additional time due to summer vacations.

"The proper supervision and education of collection personnel is probably the largest single factor affecting the quality of that site's collections, and in reducing the number of rejected specimens. We suggest DOT take steps to urge, on a voluntary basis, this type of training and education," Ms. Koke wrote to the DOT.

Industry Courses Noted

She added that there are many collector training courses offered by private industry, and NACS is in the final stage of accrediting these sites and certifying collection personnel.

"Our association believes that initiatives such as these will ultimately be more effective than new federal mandates in improving the industry," Ms. Koke said.

"However," she added, "collection sites will need encouragement from DOT to implement quality control procedures in their collection sites. Improved training, education, and supervision means the dedication of time and resources which sometimes get a low priority."

While the association believes that DOT should use training and quality control procedures as a guide for collection sites, "this direction should not be in the form of a mandate, which we believe would be inflexible and not applicable to the individual circumstances of every collection site."

NACS said last month that the new organization was created because DOT "has made it clear that the collection process was the weakest link in the drug testing process," and that through a certification program, NACS could strengthen the process through standards of operations and training of employees. □

Briefly...

● In one of the final comments to the Department of Transportation for changes in its Part 40 drug testing regulations, the Long Island Rail Road (LIRR) has asked the Department of Transportation to reduce from 25 percent to 10 percent the random drug testing rate of railroad workers under DOT jurisdiction. The Department of Transportation, which allows its six operating agencies to set random test percentages, told *Drug Detection Report* that any changes in the percentages of random tests were up to the Federal Railroad Administration and not a matter to be considered under Part 40. "Our research has shown that the perception by employees that we can randomly test them anytime or place is more important to deterrence than the actual rate," LIRR said in its comment to the DOT. "A 10-percent rate along with LIRR's strong enforcement policies would be more than enough to deter usage."

● Laboratory Specialists of America, Inc., of Oklahoma City, announced that revenue had increased 22.6 percent in the first six months of 1996 to a record of \$4.24 million, from \$3.46 million for the first six months in 1995. Management of the Nasdaq-traded stock said net income available to common stockholders for the first half of this year increased to 12 cents a share, compared to 11 cents a share last year. Laboratory Specialists of America owns and operates a nationally certified laboratory providing employee drug testing to corporate and institutional clients.

● Editek, Inc., a drug testing company based in Burlington, N.C., reported a net loss of \$264,000 on revenues for the second quarter of \$7,657,000.

● No laboratories were added or removed from the National Laboratory Certification Program during July, the Substance Abuse and Mental Health Services Administration announced Aug. 1. Listed by the Department of Health and Human Services agency were 73 labs, the same number as the previous month.

● The Republican Party's 1996 platform calls for drug testing as a "routine feature of the criminal justice process at every stage, including the juvenile justice system." Results of these tests, the party said in its platform adopted last week, "should be used in deciding pretrial release, sentencing, and probation revocation." The Republicans also charged President Clinton with having "surrendered in the war on drugs," at a time when the use of marijuana, cocaine, and methamphetamines "dramatically increased." □

Pre-Employment Testing Okayed For Louisiana School District

A Louisiana judge held May 13 that a local board of education can reinstate its pre-employment drug testing program in the district, but that his earlier ruling enjoining other drug testing for current employees would stand.

Judge Alonzo Harris of Louisiana's 27th Judicial District Court had on March 29 struck down the testing policy St. Landry Parish public school district's board of education had adopted in 1994. That policy included random, reasonable suspicion, and post-accident testing for all full-time district employees, as well as pre-employment testing.

Following oral arguments April 26, Judge Harris reversed the prohibition of pre-employment tests, although he did not explain why in his two-page opinion.

Michael J. Juneau, who represented the school board, told *Drug Detection Report* that during oral arguments the board said that testing of job applicants represented less of an invasion of privacy than did the testing of current employees. □

Laboratory Specialists Reports Quarterly \$1.9-Million Revenues

Laboratory Specialists of America, Inc. (LSAI), an Oklahoma-based drug testing company, reported revenues totaling \$1,948,536 for the three months ended March 31, according to documents filed last month with the Securities and Exchange Commission. That compares with revenues totaling \$1,657,932 for the same period in 1995.

"The increase in revenues was due to a 25-percent increase in the number of specimens analyzed during the 1996 Interim Period [the three months ended March 31, 1996] as compared to the 1995 Interim Period, although partially offset by a decrease of 3.5 percent in the average price per specimen," LSAI said.

The company said the increase in the number of specimens analyzed was due to the company acquiring National Psychopharmacology Laboratory (NPL) — a drug testing lab in Knoxville, Tenn. — early this year, as well as getting new clients through Laboratory Specialists, Inc. (LSI), a lab the company already owned, in suburban New Orleans. The forensic drug testing functions of NPL now have been con-

solidated into the operations of LSI.

The company also said that its sales are affected by seasonal trends that affect drug testing laboratories.

"In LSI's experience, testing volume tends to be higher in the second calendar quarter and lower in the winter holiday season and the beginning of the first calendar quarter primarily due to hiring patterns which affect pre-employment drug testing," the company reported.

"Because the general and administrative expenses associated with maintaining and adding to the testing work force are relatively fixed over the short term, margins tend to increase in periods of higher testing volume and decrease in periods of lower testing volume. These effects are not always apparent because of the impact and timing of the startup of new businesses and other factors such as the timing and amount of price increases or decreases. Nevertheless, the results of operations for a particular quarter may not be indicative of the results to be expected during other quarters."

LSAI reported a net income of \$202,246 for the first quarter of 1996 compared with \$162,089 for the comparable period in 1995. LSAI reported revenues of \$6,925,716 for the fiscal year ended Dec. 31, 1995. The acquisition of NPL is expected to approximately double the company's revenue, company officials have said. □

Correction

• The domestic clientele of DataMed International of Lakewood, Colo., totals more than 6,000 clients, according to a DataMed official. In an article in the June 5 issue, *Drug Detection Report* said the firm, formerly known as National MRO, a third party administrator of drug and alcohol testing programs, had 200 to 300 clients. That number, says Ben Budraitis, DataMed's director of sales and marketing, represents the number of the firm's international clients in some 50 foreign countries. □

Briefly...

• During May, no labs were added to or removed from the list of labs certified by the Substance Abuse and Mental Health Services Administration to engage in urine drug testing for federal agencies. There are 73 labs on the list, which was published in the June 4 issue of the *Federal Register*. □



Montana State AFL-CIO

Donald R. Judge
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624

DATE 3-11-97 406-442-1708

BILL NO. HB 345

Statement of Darrell Holzer, Political Director, Montana State AFL-CIO, on
HB345, before the Senate Labor and Employment Relations Committee, March 11,
1997

Mr. Chairman, members of the committee, for the record my name is Darrell Holzer and I'm here today to voice our opposition to HB 345.

You have heard proponents of this legislation suggest that anyone opposed to "random" drug testing is then logically opposed to a drug and alcohol-free workplace. This is not only not true, it is overtly offensive.

Do employers have the right to expect their employees not to be high on drugs on the job?
Of course they do. Employers have the right to expect their employees not to be high, stoned, drunk, or asleep. Job performance is the bottom line: If you cannot do the work, employers have a legitimate reason for firing you. But urine tests do not measure job performance. Even a confirmed "positive" provides no evidence of present intoxication or impairment; it merely indicates that a person may have taken a drug at some time in the past.

Can urine tests determine precisely when a particular drug was used? No. Urine tests cannot determine when a drug was used. They can only detect the "metabolites," or inactive leftover traces of previously ingested substances. For example, an employee who uses a prescription drug on Saturday night may test positive the following Wednesday, long after the drug has ceased to have any effect. In that case, what the employee did on Saturday has nothing to do with his or her fitness to work on Wednesday.

Still, isn't "random" testing the best way to catch drug users? Such testing may be the easiest way to identify drug users, but it is also by far the most un-American. Americans have traditionally believed that general searches of innocent people are unfair. This tradition began in colonial times, when King George's soldiers searched everyone indiscriminately in order to uncover those few people who were committing offenses against the Crown. Early Americans deeply hated these general searches, which were a leading cause of the Revolution.

After the revolution, when memories of the experience with warrantless searches were still fresh, the Fourth Amendment was adopted. It says that the government cannot search everyone to find the few who might be guilty of an offense. The government must have good reason to suspect a particular person before subjecting him or her to intrusive body searches. These longstanding principles of fairness should also apply to the private sector.

If you don't use drugs, you have nothing to hide--so why object to "random" testing?

Innocent people do have something to hide: their private life. The "right to be left alone" is, in the words of the late Supreme Court Justice Louis Brandies, "the most comprehensive of rights and the right most valued by civilized men."

Is Montana's existing drug testing law working? Yes. Current law provides for numerous circumstances which can "trigger" an immediate test. However, the major difference between what is currently on the books as opposed to what HB 345 proposes is basic: Current law requires some rational for requiring an individual to be subjected to a drug test. In other words, "probable cause."

Mr. Chairman, committee members, Montana's current drug testing policy is sound and it's fair. Let's not waste our time trying to fix that which is not broken. We strongly encourage the committee to reject **HB 345**.

Thank you

RANDOM DRUG TESTS FOR ALL?

WHEN THE BOSS ASKS FOR YOUR URINE, know your rights—and know which everyday substances you may have injected that can cause false-positives on drug tests. If you are using any of the items listed below and the company says you have a positive test result, demand a "Gas Chromatography-Mass Spectrophotometry (GS-MS)" or a blood test.

♦If you've taken Advil, Nuprin, Mediprin, Motrin or Rufen or suffer from a bladder or kidney infection or liver disorder—you could test positive for marijuana

♦If you've used NyQuil, Vick's Inhaler, Contac, Sudafed, diet pills, heat and asthma medications or one of many nasal sprays—you could test positive for amphetamines

♦If you've taken Amoxicillian (an antibiotic) or drank tonic water or herbal tea—you could test positive for cocaine

♦If you've taken these medicines: Elavil, Benadryl, Soma, Norflex, Phenergan—you could test positive for methadone

♦If you're taking prescription Dilantin or Phenobarbital—you could test positive for barbiturates

♦If you're using Phenergan or Vick's Formula 44; drank tonic water or eaten poppy seed rolls—you could test positive for heroin

♦If you've taken Contac, Dristan, NyQuil, Hall's Mentholated Cough Drops, Terpinhydrate and one of many other cough medicines—you could test positive for alcohol

URINE TESTS ARE OFTEN WRONG. PROTECT YOUR RIGHTS. The best protection against unfair disciplinary action based on false drug test results is a union contract. **GET YOUR RIGHTS IN WRITING.**

Information from International Union of Police Associations, AFL-CIO

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 15
DATE 3-11-97
BILL NO. HB.345



SENATE LABOR & EMPLOYMENT
LEGISLATIVE NO. 16
DATE 3-11-97
BILL NO. HB 345

P.O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086 • FAX (406) 248-7763

March 11, 1997

Mr. Chairman, members of the Committee:

For the record, my name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, here today to speak against HB 345. We are a membership based organization of some 800 households across the state, with the mission of defending the Constitution and the Bill of Rights of both the United States and Montana.

Montana is unique in many ways, and we are set apart from other states. As the preamble to our Montana Constitution states: We are grateful for "the quiet beauty of our state, the grandeur of our mountains, the vastness of our plains, and desiring to improve the quality of life, equality of opportunity and *to secure the blessings of liberty for this and future generations* do ordain and establish this constitution." (Emphasis added)

And what sets us further apart from other states, in Article II's Declaration of Rights, are a number of enumerated rights, none of which is more important than Section 10: the Right to Privacy. *The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.*

Before I came to work for ACLU/MT eight years ago, Montana had already carved out a sane and sensible response to workplace drug testing through a nearly unanimous bi-partisan solution that balanced privacy rights of individual workers on one hand with legitimate public safety, security and fiduciary interests of employers on the other.

Since then, there have been several attempts to upset that balance. Some attempts have catered to out of state corporations that are not obliged to respect privacy rights in other states in the same way that they must be regarded here in Montana. Other attempts were voiced by in state employers who want more control over the people they employ.

Gratefully, other years, the wisdom of this body has been to maintain the balance, to preserve the presumption of innocence until otherwise given reasonable cause for workplace drug testing, and to resist the temptation to erode workers privacy for some expensive and spurious sense of security from having workers urinate into cups.

To paraphrase Thomas Jefferson, "Show me a nation that is willing to sacrifice a little liberty for a little security, and I'll show you a nation that deserves neither and that will relinquish both"

My main point is this: if you upset the existing balance that exists in current statute, a couple of things might happen. First, an employer would no longer has to have cause for testing, and the door to random testing would be flung open wide. The issue of impairment on the job would not be in any way better addressed than under current law. But, I think a reasonable person can see that the over breadth of the new law might well invite the bringing of legal action by some employee who feels workplace testing violates their constitutional rights under Montana's right to privacy provision. Perhaps that issue should be brought before our state supreme court to determine whether an employer has the right to be in charge of more than a employee's working life. . If a worker is impaired, exisisting law allows for testing, as it should. However, if a worker is not impaired on the job, it does not become the employer's business to know what one does on one's own time-- that should only be one's own business.

To close, the proponents have not convinced me that there is a compelling state interest for more intrusive and open ended expansion of workplace drug testing. I hope you weigh these arguments in your considerations today and come to the conclusion that the existing law is a well crafted balance that serves Montana's needs while protecting all of our rights. I urge you to reject HB 345.

Thank you for your time and consideration.

The following chart is a **guide** to determine various blood alcohol percentages. Use the weight closest to yours.

SENATE LABOR & EMPLOYMENT
 COMMITTEE NO. 17
 DATE 3-11-97
 BILL NO. HB 345

BAC CHART

After hours	1 Drink				2 Drinks				3 Drinks				4 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	--	--	--	.02	--	--	.05	.06	.07	.10	.10	.10	.12	.12	.15	.15
100	--	--	--	.02	--	--	.04	.06	.05	.07	.08	.09	.09	.10	.12	.13
120	--	--	--	.02	--	--	.03	.04	.03	.04	.06	.08	.06	.06	.09	.11
140	--	--	--	.01	--	--	.02	.04	.02	.03	.05	.06	.04	.06	.08	.09
160	--	--	--	.01	--	--	.02	.03	.01	.02	.04	.05	.03	.04	.06	.06
180	--	--	--	.01	--	--	.01	.03	--	.02	.03	.04	.02	.04	.05	.07
200	--	--	--	--	--	--	.01	.02	--	.01	.03	.04	.01	.03	.04	.06

After hours	5 Drinks				6 Drinks				7 Drinks				8 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	.17	.17	.19	.20	.19	.22	.22	.25	.25	.27	.27	.30	.29	.30	.32	.33
100	.13	.14	.16	.17	.16	.18	.19	.21	.20	.22	.23	.25	.24	.25	.27	.28
120	.09	.11	.13	.14	.13	.14	.16	.17	.15	.17	.19	.20	.19	.20	.22	.23
140	.07	.09	.10	.12	.10	.12	.13	.15	.13	.14	.16	.17	.15	.17	.18	.20
160	.06	.07	.09	.10	.08	.09	.11	.13	.10	.12	.13	.15	.13	.14	.16	.17
180	.04	.06	.07	.09	.06	.08	.09	.11	.09	.10	.12	.13	.11	.12	.14	.15
200	.03	.04	.06	.08	.05	.07	.08	.09	.07	.09	.10	.12	.09	.10	.12	.13

Numbers equal the percentage of alcohol in the blood. Dash (--) = a trace of alcohol.

Example: A 180 pound person who has consumed 4 drinks in 3 hours will have a BAC level of .04%.

For more in-depth information concerning blood alcohol concentration (BAC) call or write: Montana Highway Traffic Safety Division, 303 N. Roberts, Helena, MT 59620, (406) 444-3412.

DATE 3-11-97

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: HB 345, HB 341, HB 447

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
GARY GAHAGAN	GUARDIAN SECURITY	447	X	
Cecil Hiter		345	X	
DEAN RANDASH	NAPA Auto Parts	341	X	
Boyd Lundberg	Polson Auto Parts	341	X	
Richard C. IKE	Polson Auto Parts	341	X	
Robert Garding	Stevensville NAPA Auto	341	X	
DAN EDWARDS	OCEAN	345		X
Carl Schwitzer	MI Auto Ass'n	345	X	
Scott Cusick	ACLU MT	345		X
Barbara Martin	Department of Transportation	345	X	
Leslie Bruski	Pro+med MRO+PRO ' MCN	345	X	
Dean Björke	Diamond Const	345	X	
Ben Hovdahl	MT Motor Carriers Assn	345	X	
ED LOGAN	O.C. A.W. 2-470	345		X

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3-11-97

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: HB 345, HB 341, HB 447

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Charles R. Brooks	Billing & Chandler	345	☒	☐
Calvin F. Flink	Missouri Motor Parts	341	☒	☐
JAY Shepard	Motor Motor Parts	341	☒	☐
Riley Johnson	NFIB	345 341	☒ ☒	☐
Tom STEPHENS	AAPA	341	☒	☐
JORDAN THUN	MMA	345	☐	☒
Jolene Turner	TRI med Services	345	☒	☐
Bob Worthington	MMA	345	☐	☒

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3-11-97

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: HB 345, HB 341, HB 447

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Tye Schultz	^{officer for} SELF (CONSTRUCTION WORKER)	345	X	
PATRICK HAYDEN	EMPIRE SAND & GRAVEL SAFETY	345	X	
Don Allen	Mt. Wood Products Assn	345	X	
R. PERRY FESCRIDGE	Do Commerce / POL	447	X	
Steve Turkiewicz	Mt. Auto Dealers Assn	345	X	
Russell B Hill	Mt. Trial Lawyers	345		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By CHAIRMAN THOMAS F. KEATING, on March 20, 1997,
at 3:25 p.m., in Room 413/415.

ROLL CALL

Members Present:

Sen. Thomas F. Keating, Chairman (R)
Sen. James H. "Jim" Burnett, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Benedict (R)
Sen. C.A. Casey Emerson (R)
Sen. Dale Mahlum (R)
Sen. Debbie Bowman Shea (D)
Sen. Fred Thomas (R)
Sen. Bill Wilson (D)

Members Excused: None

Members Absent: None

Staff Present: Eddy McClure, Legislative Services Division
Janice Soft, Substitute Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted:

Executive Action: HB 345, BE CONCURRED IN AS
AMENDED
HB 517, BE CONCURRED IN AS
AMENDED
HB 519, TABLED
HB 252, TABLED

EXECUTIVE ACTION ON HB 345

Amendments: HB034501.AEM & HB034505.ASM (EXHIBITS 1 - 4)

Motion: SEN. STEVE BENEDICT moved do-concur on HB 345 and on
amendment (EXHIBIT 1).

Discussion: Carl Schweitzer, Montana Contractors' Association,
said amendment number 1 through 4 (EXHIBIT 1), involve those drug

tests which are not approved by the Department of Transportation but some companies have been using these to do initial tests. When they hire new employees they are using these tests to prove that the employees are not using drugs or alcohol. They have amended this into the bill so they can continue to use these types of tests as long as the employee shows negative results.

He said when the employee shows potential positive, then the employee has to be re-tested using the Department of Transportation requirements to prove a positive. This is so the employee does not show any false positive tests and the Department of Transportation process has a much higher degree of reliability.

Mr. Schweitzer said amendments 5 and 6 are actually an alternative to amendment 7 (**EXHIBIT 2**). If an employee has a positive test result, the first specimen is sent away and tested and if it comes back positive the employee has the option of having a second vial sent to another lab to be re-tested. The amendment changes the employee paying for the second test to the employer. **Mr. Schweitzer** suggested a third alternative. If an employee wants to be re-tested and it comes back negative, then the employer should pay for it. If it comes back positive a second time, then the employee should pay for it. He said the reason is that if an employee has the first test positive and it is required the employer pay for the second test which he knows will come back positive, this is just an added expense for the employer.

SEN. BENEDICT said he would like to move all the amendments at once because he feels they are all pretty workable.

SEN. SUE BARTLETT asked **Carl Schweitzer** about his comment indicating that regarding amendments 1 through 4, some employers are already using these testing devices.

Mr. Schweitzer answered they are non-DOT (Department of Transportation) testing.

SEN. BARTLETT asked if that is in the State of Montana? She said that is prohibited under current law.

Mr. Schweitzer said he understood what **SEN. BARTLETT** means.

SEN. BARTLETT said so current law states they are supposed to meet the 49 CFR part 40 which apparently is the DOT procedures for testing. She asked if anything is known about the accuracy and reliability of these other instruments that people are using or what to be able to use?

Mr. Schweitzer responded he is not an expert on the drug testing capabilities of other types of equipment. It was brought to his attention by some other legislators used as a pre-employment to check employees before they were hired. If the results were

positive, he thinks they were going through the DOT process to give applicants a second opportunity. He said he does not know the reliability or accuracy of this testing.

SEN. BARTLETT said that may be why some employers are not getting any positive pre-employment tests. It may be the equipment they are using. She said this reminds her of the judiciary they had regarding the equipment which is used for breath tests when someone is stopped for DUI. She said it really makes a difference that you have clearly accurate and reliable equipment with which to do these tests. She said this amendment does not specify that any particular accuracy or reliability standards which she feels is a mistake.

SEN. BENEDICT stated he believes the amendments say if the employer wants to use a test which is not DOT certified, that is his choice and if the results come back positive, the employee can ask for the DOT testing. He does not see that as being an issue.

SEN. BARTLETT stated then employees can have two tests, instead of just one.

SEN. BENEDICT answered not necessarily, if they test positive on the first test at the employers expense then take another test and test negative, the employer will pay for that test too. He is not sure all employers will use home kits or less expensive tests, he thinks they will screen employees really good. If a test is not reliable he believes they will use the DOT tests.

SEN. CASEY EMERSON said that when employers look and talk with an employee he can sometimes tell which test to use. He agreed with **SEN. BENEDICT**.

Vote: The motion carried with 2 opposing votes from **SEN. DEBBIE SHEA** and **SEN. BARTLETT**.

Motion: **CHAIRMAN KEATING** moved amendment (EXHIBIT 2), numbers 1 through 3.

Discussion: **SEN. FRED THOMAS** said he thinks people would like to know why we are adding this.

CHAIRMAN KEATING answered because there is commercial intrastate carriers and controlled substance is a more inclusive phrase than drug.

SEN. BARTLETT said controlled substance is also the term which is included in the definitions so that would provide clarity to what is being said there.

Vote: The motion unanimously carried to add numbers 1 through 3 (EXHIBIT 2) to the amendment.

Discussion: Eddye McClure said amendment #7 is not needed with the adoption of SEN. BENEDICT'S amendment (EXHIBIT 1).

Carl Schweitzer explained amendment numbers 3 through 6.

Number 3 changes the verbiage on page 3, lines 21 and 22. They have added in when an employer puts together their drug testing policy, they must identify what types of tests they use, whether it be pre-employment, random, post-accident, reasonable cause or follow-up.

In referring to number 4, he said all information was confidential and only the tested employee or designated representative of the employer could get the information. Before the amendment, the language in the bill said employers or agents of the employer who are specifically authorized by the tested employee to receive the employees test result. He cited an example of what would often happen. If a company had 100 employees who had to sign a document when hired which tells who the employer's agents are that have access to their information. If those people left the company, the employer would have to get 100 new signatures so they had the employer's representative recorded. The purpose of this amendment is because they feel since the employer is paying for the test, they should have access to that information so they have to designate the representative. He said this is clean-up language.

Mr. Schweitzer said amendment number 5 states the employer can test as a condition of hire instead of any new perspective employee. Before you can bring somebody on board and they become an employee, you have to test them before that moment.

He said number 6 involves the follow-up test. This language clears the issue of having a verified positive test for controlled substance or alcohol before follow-up tests are performed.

Eddye McClure stated she felt the word 'the' should be added after hire.

This was confirmed by several on the committee.

Motion/Vote: The motion carried unanimously to add amendments on (EXHIBIT 2), excluding number 7, to HB 345.

Discussion: CHAIRMAN KEATING explained amendments on (EXHIBIT 3). He said if a worker was in the proximity of an accident and was required to take a test and then was found not to be a direct or proximate cause of the work-related accident, then his records would be purged.

He said that is not a very good idea. This is a drug testing bill. If the employee who is tested after an accident is positive, you cannot very well purge his record and if it is a

negative test, that should be kept in his record to support the fact he was clean at the time.

CHAIRMAN KEATING said he agreed to explain the amendment but does not want to move the amendment because he does not see a need for it.

SEN. BARTLETT said during the last session what they were trying to do was to focus the testing on employees who had been the direct or proximate cause of a work-related accident. An employee who happens to be in the vicinity, what they subsequently found was not the direct or proximate cause of the accident, didn't have anything to do with causing the accident, but it is that employee's test results which should be taken out of the file and destroyed because we assumed that when there is an accident, there could be a few employees in or near the accident site. These employees need to be tested right away or you loose the validity of the test because the body metabolizes these kinds of substances. So they do the testing at the time or shortly after the accident on whatever employees are in the vicinity and could have been the direct or proximate cause of the accident. They gather the investigative material they need, then do an investigation of what did cause the accident. They find out employees #1 and #2 had some role in causing the accident, but employees #3, #4, and #5 simply happened to be there at the time of the accident and had no role in causing the accident. So the test results of employees #3, #4, and #5 should be taken from their folders and destroyed and test results of employees #1 and #2 should stay as part of their record.

SEN. BENEDICT said he believes if a party were even close to an accident they would want those test results in their file.

SEN. EMERSON stated this bill is setting up random drug testing, that certainly is random so why not leave it?

SEN. BARTLETT answered when it is an accident site it is very specific to all employees who are at the accident site rather than random.

SEN. EMERSON said it is still random from the standpoint of not doing it on a daily basis.

SEN. FRED THOMAS asked if the test reflects simply positive or negative or if it is negative and there are some residual of drugs, if that shows up on the test?

SEN. BARTLETT said all of these tests do test for residuals because the active ingredients metabolize so fast.

SEN. DALE MAHLUM said there are so many different things in a test that say what is in it. There are certain criteria set on the tests and they show how far over the median that person shows in their system. There are many different measurements in the

test down to small milligrams. He stated they are very conclusive.

Vote: The motion to add this amendment failed by a 3 to 6 voice vote with **SEN. BARTLETT**, **SEN. SHEA** and **SEN. BILL WILSON** voting in favor of the amendment.

Motion: **SEN. BARTLETT** moved amendments in (EXHIBIT 4).

Discussion: **SEN. BARTLETT** stated these amendments are relatively minor.

She said the first amendment adds to the definition of an employee on page 1, line 24, which means an individual engaged in the performance, supervision, or management of work....etc.". She said the reason for that is because later in the bill it talks of the random testing process which must include all supervisory and managerial employees in random selection and testing process. So this makes the definition fit with how it is used later in the bill.

SEN. BARTLETT said amendment number 2 is on page 3, line 12. This is the policies and procedures that an employer must have. Subsection (b) talks about the employers proposal for educating. She stated if this is policies and procedures, it has to be more than a proposal. She said she is simply changing it to read the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol since the whole point of this bill is workplace safety.

She stated the third amendment, page 6, lines 21 and 22 goes back to the wording in the current statute. This pertains to the accident situation and it proposes to make subsection 5 read, "An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury.....etc".

SEN. BARTLETT explained the last amendment on page 7, line 3. She proposed the limitation on adverse action to read, "No adverse action, including follow-up testing, may be taken....etc."

SEN. BENEDICT asked **Carl Schweitzer** if he agrees with these amendments.

Mr. Schweitzer responded he thinks these are good amendments.

SEN. THOMAS said it seems to him number 3 changes the texture of the bill.

Mr. Schweitzer said he thinks each situation should be considered. If there is an employee whose actions or lack of

actions cause an injury, he thought this amendment changed the verbiage but not the character of what was being suggested here.

SEN. BENEDICT said when we have **SEN. JIM BURNETT'S** drug testing bill in the last session and they talked about this and they all came to the conclusion that wording would fit the drug test in the past.

Vote: It was unanimously decided by voice vote to add amendment **EXHIBIT 4**.

Discussion: **SEN. BARTLETT** distributed **EXHIBIT 5**. She said this is a survey from the American Management Association of employers and managers on drug testing. They found that everybody believed that drug testing would be effective in dealing with workplace drug abuse. But when they pressed the Human Resource Managers in the companies which do test, they found little statistical evidence that their organization's drug testing program resulted in declines and absenteeism, disability claims, accident rates, incidents of employee theft, and incidents of employee violence.

SEN. BARTLETT feels this is significant as she sees bills attempting to be a simple answer to a complex problem. She said simple answers do not work. She believes the current state law in drug testing is appropriate and focused.

SEN. BENEDICT said if random drug testing, or drug testing of any type, helps an accident rate by 9% or even prevents one accident or one disability claim or illness or employee theft, it doesn't matter if the results are huge and astounding. Whatever needs to be done to help people who work with those who use drugs in the workplace and also for the employers who have to pay the insurance premiums.

SEN. BARTLETT said the American Management Association pointed out that 18 of the surveyed firms had discontinued testing programs and the leading reason being that programs were not cost effective.

SEN. WILSON said he has seen drug testing and lived it and has watched it done and from personal experience he knows it does work. He has lived the days when they lined people up against the wall, and you got your luggage and they brought in German Shepherds. He said he did not like that and also did not like being hauled into a hospital after working a shift, but ultimately, from what he has experienced, it works. He said he has struggled with this issue, but people are kidding themselves if they don't believe it's out there.

From personal experience 18 years ago, **SEN. WILSON** said he was the outcast because he didn't take drugs. He said not a year goes by that someone doesn't lose a leg or arm. If you are rolling down the track with 12,000 ton train behind you and there is another train in front of you, you have to be able to perceive

the depth to the switch. It will make a difference between life and death.

SEN. WILSON said if he votes for this bill, there will probably be a lot of talk about him, but drugs are out there and he cannot think of anything else that will effectively deal with this.

SEN. SHEA asked SEN. WILSON if he thinks what we have in place right now is working.

SEN. WILSON said what he has seen that works is random testing. He personally saw people value their job much, much more than their habit, so when they would take the drug test they prepared for it.

He also mentioned possibly opening up other sections of the bill to find out who all should be included in this random testing.

Vote: The motion that HB 345 be concurred in with amendments carried with a 7 to 2 voice vote. Those opposing the bill were SEN. SHEA and SEN. BARTLETT.

{Tape: 1; Side: B; Approx. Time Count: 4:10 p.m.}

NOTE: CHAIRMAN KEATING RELINQUISHED CHAIR TO VICE CHAIRMAN JIM BURNETT.

EXECUTIVE ACTION ON HB 517

Amendments: HB051715.AEM (EXHIBIT 6)

Motion: SEN. BENEDICT moved that HB 517 be concurred in. He then moved amendments (EXHIBIT 6).

Discussion: SEN. BENEDICT said that in number 2, the words "written authorization" need to be taken out and also take it out of the title.

He said in amendment 4 also scratch out the words "written authorization".

SEN. BENEDICT said these are not amendments that REP. VICK has concurred in, they are his own amendments. He felt that the yearly re-authorization was pushing things too far. He said he is trying to simplify this to be a positive check-off system rather than negative. He had Jerome Anderson help him with these so if there are questions SEN. BENEDICT cannot answer, Mr. Anderson can. He is trying to make the bill user-friendly and still accomplish the purpose for which it is intended.

NOTE: CHAIRMAN KEATING RETURNED TO CHAIR COMMITTEE.

SEN. EMERSON asked SEN. BENEDICT if he were talking every year so that this notice would be sent. He thought the sponsor of the

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

ROLL CALL

DATE

3/20/97

[illegible]

SEN:1997
wp.rollcall.man
CS-09

Amendments to House Bill No. 345
Third Reading Copy

Requested by Senator Benedict
For the Senate Committee on Labor and Employment

Prepared by Eddy McClure
March 18, 1997

1. Page 2.

Following: line 7

Insert: "(7) Initial test" means scientifically accepted analytical methods and procedures that have been cleared by the federal food and drug administration for commercial distribution. Specimen collection and chain of custody procedures for an initial test must conform to 49 CFR, part 40."

Renumber: subsequent subsections

2. Page 3, line 8.

Following: "40"

Insert: ", except an initial test for a controlled substance or alcohol may be used as provided in subsection (8)"

3. Page 4, line 20.

Following: "AND"

Insert: "confirmation"

4. Page 5.

Following: line 13

Insert: "(8) An employer may use an initial test to screen an employee or prospective employee for the use of a controlled substance or alcohol. If the initial test results indicate a potential positive, the initial test must be confirmed. Confirmation tests must be completed using collection, transporting, and testing procedures that conform to 49 CFR, part 40. Only confirmed test results may be used to determine if an employee tests positive for a controlled substance or alcohol. Only confirmed positive or negative test results may be entered into an employee's personal file."

5. Page 6, line 28.

Following: "REQUEST"

Strike: "AND AT THE EMPLOYEE'S EXPENSE"

6. Page 6, line 29.

Following: "TESTED."

Insert: "The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the additional test results are positive."

Amendments to House Bill No. 345
Third Reading Copy

For the Committee on Labor

Prepared by Stephen Maly
March 12, 1997

1. Page 2, line 1.
Strike: "DRUG"
Insert: "controlled substance"
2. Page 2, line 2.
Strike: "INTERSTATE"
Insert: "commercial"
3. Page 3, lines 21 and 22.
Following: "(f)" on line 21
Strike: the remainder of line 21 through "test" on line 22
Insert: "identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in [section 4]"
4. Page 4, lines 2 and 3.
Following: "(ii)"
Strike: the remainder of line 2 through "results" on line 3
Insert: "the designated representative of the employer"
5. Page 5, line 18.
Following: "TEST"
Strike: "ANY"
Insert: "as a condition of hire" ~~the~~
6. Page 6, lines 10 and 11.
Strike: line 10 in its entirety through "SITE" on line 11
Insert: "employee has had a verified positive test for a controlled substance or alcohol"
7. Page 6, line 28.
Strike: second "EMPLOYEE'S"
Insert: "employer's"

Amendments to House Bill No. 345
Third Reading Copy

For the Committee on Labor

Prepared by Stephen Maly
March 14, 1997

1. Page 7, following line 19.

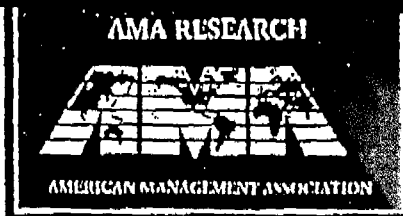
Insert: "(3) The written record of a urine test of an employee who is required to submit to testing pursuant to [section 4] and whose acts or failure to act is subsequently found not to be the direct or proximate cause of a work-related accident must be removed from the employee's work record and must be destroyed."

Amendments to House Bill No. 345
Third Reading Copy

Requested by Senator Bartlett
For the Senate Committee on Labor and Employment Relations

Prepared by Eddye McClure
March 20, 1997

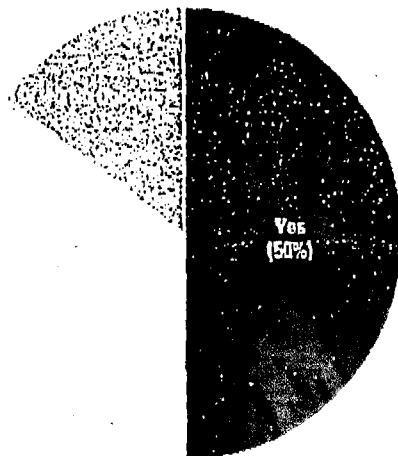
1. Page 1, line 24.
Following: "performance"
Insert: ", supervision, or management"
2. Page 3, line 12.
Following: "employer's"
Strike: "proposal"
Insert: "program"
Following: "for"
Insert: "regularly"
Following: "health"
Insert: "and workplace safety"
3. Page 6, lines 21 and 22"
Following: the second "THE"
Strike: remainder of line 21 through "TO" on line 22.
Insert: "employee's act or failure to act is a direct or proximate cause of"
4. Page 7, line 3.
Following: "ACTION."
Strike: "ADVERSE"
Insert: "No adverse"
Following: "ACTION"
Insert: ", including followup testing,"
Following: "MAY"
Strike: "NOT"



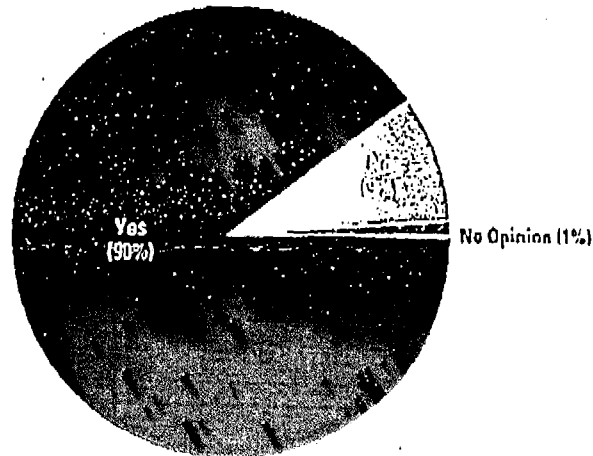
SENATE LABORATORY
EXHIBIT NO. 5
DATE 3/20/97
BILL NO. HB 345

Is Testing Effective? Human resources managers in companies that practice drug testing have been won over to its effectiveness: to the question, "Do you think that drug testing is an effective way to deal with workplace drug abuse?", the share answering "Yes" has increased to 90% from 50% in 1987.

IS TESTING EFFECTIVE (1987)

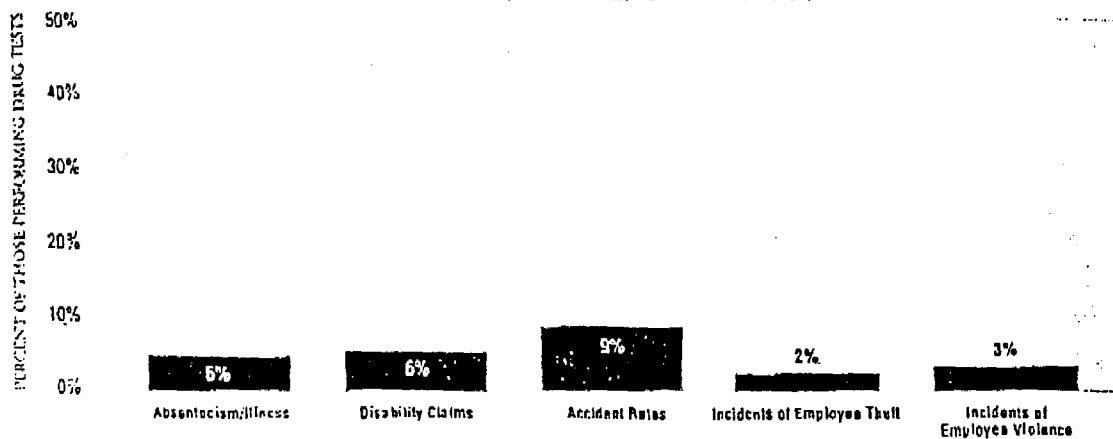


IS TESTING EFFECTIVE (1996)



But this opinion is apparently based on assumptions unsupported by data. The AMA questionnaire asked HR managers in companies that test if they had "statistical evidence that your organization's drug testing program has resulted in" declines in five key areas. In no case did the share answering "Yes" exceed single digits.

STATISTICAL EVIDENCE OF DECLINE



The caution here is not that drug testing is ineffective. It is very effective at *identifying drug users*, although ten years of survey data fails to give evidence that testing deters drug use.

In an era of cost control and cost cutting, statistical evidence is vital if programs are to be justified. Only eight percent of companies that test have performed a cost-benefit analysis; eighteen surveyed firms have discontinued testing programs, the leading reason being that "programs were not cost effective." Better record-keeping is not only desirable; it may also prove necessary to keep programs operating outside of those areas where government mandates make testing an operational necessity.

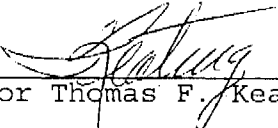


SENATE STANDING COMMITTEE REPORT

Page 1 of 3
March 21, 1997

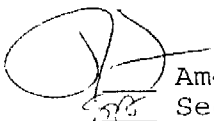
MR. PRESIDENT:

We, your committee on Labor and Employment Relations having had under consideration House Bill 345 (third reading copy -- blue), respectfully report that House Bill 345 be amended as follows and as so amended be concurred in.

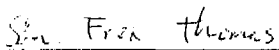
Signed: 
Senator Thomas F. Keating, Chair

That such amendments read:

1. Page 1, line 24.
Following: "performance"
Insert: ", supervision, or management"
2. Page 2, line 1.
Strike: "DRUG"
Insert: "controlled substance"
3. Page 2, line 2.
Strike: "INTERSTATE"
Insert: "commercial"
4. Page 2.
Following: line 7
Insert: "(7) 'Initial test' means scientifically accepted analytical methods and procedures that have been cleared by the federal food and drug administration for commercial distribution. Specimen collection and chain of custody procedures for an initial test must conform to 49 CFR, part 40."
Renumber: subsequent subsections
5. Page 3, line 8.
Following: "40"
Insert: ", except an initial test for a controlled substance or alcohol may be used as provided in subsection (8)"



Amd. Coord.
Sec. of Senate


Senator Carrying Bill

621121SC.SRF

6. Page 3, line 12.
Following: "employer's"
Strike: "proposal"
Insert: "program"
Following: "for"
Insert: "regularly"
Following: "health"
Insert: "and workplace safety"

7. Page 3, lines 21 and 22.
Following: "(f)" on line 21
Strike: the remainder of line 21 through "test" on line 22
Insert: "identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in [section 4]"

8. Page 4, lines 2 and 3.
Following: "(ii)"
Strike: the remainder of line 2 through "results" on line 3
Insert: "the designated representative of the employer"

9. Page 4, line 20.
Following: "AND"
Insert: "confirmation"

10. Page 5.
Following: line 13
Insert: "(8) An employer may use an initial test to screen an employee or prospective employee for the use of a controlled substance or alcohol. If the initial test results indicate a potential positive, the initial test must be confirmed. Confirmation tests must be completed using collection, transporting, and testing procedures that conform to 49 CFR, part 40. Only confirmed test results may be used to determine if an employee tests positive for a controlled substance or alcohol. Only confirmed positive or negative test results may be entered into an employee's personal file."

11. Page 5, line 18.
Following: "EMPLOYEE"
Insert: "as a condition of hire"

12. Page 6, lines 10 and 11.
Strike: line 10 in its entirety through "SITE" on line 11
Insert: "employee has had a verified positive test for a controlled substance or for alcohol"

13. Page 6, lines 21 and 22

Following: the second "THE"

Strike: remainder of line 21 through "TO" on line 22.

Insert: "employee's act or failure to act is a direct or proximate cause of"

14. Page 6, line 28.

Following: "REQUEST"

Strike: "AND AT THE EMPLOYEE'S EXPENSE"

15. Page 6, line 29.

Following: "TESTED."

Insert: "The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the additional test results are positive."

16. Page 7, line 3.

Following: "ACTION."

Strike: "ADVERSE"

Insert: "No adverse"

Following: "ACTION"

Insert: ", including followup testing,"

Following: "MAY"

Strike: "NOT"

-END-

SENATE JOURNAL
SEVENTY-FIRST LEGISLATIVE DAY - APRIL 4, 1997

**SECOND READING OF BILLS
(COMMITTEE OF THE WHOLE)**

Majority Leader Harp moved that the Senate resolve itself into the Committee of the Whole for consideration of business on second reading. Motion carried. Senator Swysgood in the Chair.

Mr. President: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

Senator Toews excused at this time.

SB 195-House amendments - Senator Harp moved consideration of House amendments to SB 195 be passed for the day. Motion carried.

HB 129 - Senator Franklin moved consideration of HB 129 be placed below HB 502 on the second reading board this day. Motion carried.

HB 333 - Senator Thomas moved HB 333 be concurred in. Motion carried unanimously.

HB 345 - Senator Bartlett moved HB 345, second reading copy, be amended as follows:

1. Page 2, lines 9 through 12.

Strike: subsection (7) in its entirety

Renumber: subsequent subsections

2. Page 3, lines 13 through 15.

Following: "40" on line 13

Strike: remainder of line 13 through "(8)" on line 15

3. Page 5, lines 24 through 30.

Strike: subsection (8) in its entirety

Amendment **failed** as follows:

Yeas: Bartlett, Bishop, Brooke, Christiaens, Crippen, Doherty, Eck, Franklin, Grosfield, Halligan, Harp, Jergeson, Lynch, McCarthy, Nelson, Shea, Stang, Van Valkenburg, Waterman, Wilson.

Total 20

Nays: Baer, Beck, Benedict, Burnett, Cole, Crismore, DePratu, Devlin, Emerson, Estrada, Foster, Gage, Glaser, Hargrove, Hertel, Holden, Jabs, Jenkins, Keating, Mahlum, McNutt, Mesaros, Miller, Mohl, Sprague, Swysgood, Taylor, Thomas, Mr. President.

Total 29

Absent or not voting: None.

Total 0

Excused: Toews.

Total 1

SENATE JOURNAL
SEVENTY-FIRST LEGISLATIVE DAY - APRIL 4, 1997

Senator Toews present at this time.

Senator Keating moved HB 345 be concurred in. Motion carried as follows:

Yeas: Baer, Beck, Benedict, Burnett, Cole, Crismore, DePratu, Devlin, Emerson, Estrada, Foster, Gage, Glaser, Grosfield, Hargrove, Harp, Hertel, Holden, Jabs, Jenkins, Keating, Mahlum, McNutt, Mesaros, Miller, Mohl, Sprague, Swysgood, Taylor, Thomas, Toews, Mr. President.

Total 32

Nays: Bartlett, Bishop, Brooke, Christiaens, Crippen, Doherty, Eck, Franklin, Halligan, Jergeson, Lynch, McCarthy, Nelson, Shea, Stang, Van Valkenburg, Waterman, Wilson.

Total 18

Absent or not voting: None.

Total 0

Excused: None.

Total 0

Senator Emerson excused at this time.

HB 502 - Senator Waterman moved HB 502 be concurred in. Motion carried unanimously.

HB 129 - Senator Franklin moved HB 129, second reading copy, be amended as follows:

1. Page 3, line 11.

Following: the second "care"

Insert: "or nonmedical remedial health care recognized by an insurer licensed to provide disability insurance under Title 33"

2. Page 3, line 15.

Following: "parent"

Insert: "or legal guardian"

Strike: "medical"

Insert: "adequate health"

3. Page 3, line 17.

Strike: "medical"

Insert: "adequate health"

Strike: "or"

Following: "risk of"

Insert: "serious"

4. Page 7, line 6.

Following: "privilege."

Insert: "For purposes of subsections (4)(b) and (4)(c), the term "clergyperson" includes a Christian Science practitioner."

3rd Reading

SENATE JOURNAL
SEVENTY-SECOND LEGISLATIVE DAY - APRIL 5, 1997

Excused: None.
Total 0

HB 333, as amended, concurred in as follows:

Yeas: Baer, Bartlett, Beck, Benedict, Bishop, Brooke, Burnett, Christiaens, Cole, Crippen, Crismore, DePratu, Doherty, Eck, Emerson, Estrada, Foster, Franklin, Gage, Glaser, Grosfield, Halligan, Hargrove, Harp, Hertel, Holden, Jabs, Jenkins, Jergeson, Keating, Lynch, Mahlum, McCarthy, McNutt, Mesaros, Miller, Mohl, Nelson, Shea, Sprague, Stang, Taylor, Thomas, Toews, Van Valkenburg, Waterman, Wilson, Mr. President.
Total 48

Nays: Devlin, Swysgood.
Total 2

Absent or not voting: None.
Total 0

Excused: None.
Total 0

HB 345, as amended, concurred in as follows:

Yeas: Baer, Beck, Benedict, Burnett, Cole, Crismore, DePratu, Devlin, Emerson, Estrada, Foster, Gage, Glaser, Grosfield, Hargrove, Hertel, Holden, Jabs, Jenkins, Keating, Mahlum, McNutt, Mesaros, Miller, Mohl, Sprague, Taylor, Thomas, Toews, Mr. President.
Total 30

Nays: Bartlett, Bishop, Brooke, Christiaens, Crippen, Doherty, Eck, Franklin, Halligan, Harp, Jergeson, Lynch, McCarthy, Nelson, Shea, Stang, Swysgood, Van Valkenburg, Waterman, Wilson.
Total 20

Absent or not voting: None.
Total 0

Excused: None.
Total 0

HB 365 concurred in as follows:

Yeas: Baer, Beck, Benedict, Bishop, Burnett, Christiaens, Cole, Crippen, Crismore, DePratu, Devlin, Emerson, Estrada, Foster, Gage, Glaser, Grosfield, Hargrove, Harp, Hertel, Holden, Jabs, Jenkins, Jergeson, Keating, Lynch, Mahlum, McCarthy, McNutt, Mesaros, Miller, Mohl, Nelson, Shea, Sprague, Stang, Swysgood, Taylor, Thomas, Toews, Wilson, Mr. President.
Total 42

Nays: Bartlett, Brooke, Doherty, Eck, Franklin, Halligan, Van Valkenburg, Waterman.
Total 8

SENATE JOURNAL
SEVENTY-SECOND LEGISLATIVE DAY - APRIL 5, 1997

Total 0

Excused: None.

Total 0

MOTIONS

HB 395 and HB 523 - Senator McCarthy moved she be allowed to change her vote on HB 395 and HB 523, third reading, from nay to yea. Motion carried.

HB 345 - Senator Waterman moved she be allowed to change her vote on HB 345, third reading, from yea to nay. Motion carried.

HB 571 - Senator Shea moved she be allowed to change her vote on HB 571, third reading, from yea to nay. Motion carried.

HB 365 - Senator Wilson moved he be allowed to change his vote on HB 365, third reading, from nay to yea. Motion carried.

HB 365 - Senator Halligan moved he be allowed to change his vote on HB 365, third reading, from yea to nay. Motion carried.

HB 571 - Senator Eck moved she be allowed to change her vote on HB 571, third reading, from yea to nay. Motion carried.

**SECOND READING OF BILLS
(COMMITTEE OF THE WHOLE)**

Majority Leader Harp moved that the Senate resolve itself into the Committee of the Whole for consideration of business on second reading. Motion carried. Senator Stang in the Chair.

Mr. President: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

HB 240 - Senator Van Valkenburg moved HB 240 be concurred in. Motion carried unanimously.

HB 369 - Senator Thomas moved HB 369 be concurred in. Motion carried unanimously.

HB 408 - Senator Eck moved HB 408 be concurred in. Motion carried unanimously.

HB 461 - Senator Eck moved HB 461 be concurred in. Motion **failed** as follows:

Yeas: Bartlett, Brooke, Christiaens, Doherty, Eck, Franklin, Halligan, Hargrove, Jenkins, Jergeson, Lynch, McCarthy, Shea, Van Valkenburg, Waterman.

Total 15

2nd Reading - Committee of Whole

HOUSE JOURNAL
SEVENTY-FIFTH LEGISLATIVE DAY - APRIL 9, 1997

Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kasten, Keenan, Kitzenberg, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Pavlovich, Pease, Peck, Quilici, Raney, Ream, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Walters, Wells, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 86

Noes: Adams, Beaudry, Boharski, Brainard, Cocchiarella, Curtiss, Jore, Knox, Orr, Prouse, Rehbein, Sliter, Wagner.
Total 13

Excused: None.
Total 0

Absent or not voting: Denny.
Total 1

HB 345 - Representative Masolo moved Senate amendments to HB 345 be concurred in. Motion carried as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Carey, Clark, Cobb, Cocchiarella, Curtiss, DeBruycker, Devaney, Ellis, Feland, Grady, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Lawson, Marshall, Masolo, McCann, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Peck, Prouse, Ream, Rehbein, Rose, Sands, Schmidt, Simon, Simpkins, Sliter, Smith, Soft, Stovall, Swanson, Tash, Taylor, Wagner, Walters, Wells, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 73

Noes: Denny, Dowell, Ellingson, Ewer, Galvin, Gillan, Hagener, Harper, Harrington, Heavy Runner, Hurdle, Kottel, Krenzler, McCulloch, Pavlovich, Pease, Quilici, Raney, Ryan, Simpson, Squires, Story, Trexler, Tropila, Tuss, Vick, Whitehead.
Total 27

Excused: None.
Total 0

Absent or not voting: None.
Total 0

HB 346 - Representative Tropila moved Senate amendments to HB 346 be concurred in.

Representative Tropila withdrew his previous motion.

Representative Tropila moved Senate amendments to HB 346 be not concurred in. Motion carried as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Carey, Clark, Cobb, Cocchiarella, Curtiss, DeBruycker, Denny, Devaney, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper,

HOUSE BILL NO. 345

INTRODUCED BY MASOLO

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL TESTING PROGRAMS;~~ PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through ~~5-8~~ 7] may be cited as the "~~Private Workforce~~ WORKFORCE Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8~~ 7], the following definitions apply:

(1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

(2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL BREATH TEST.

~~(1)(3)~~ (3) "Controlled substance" means a dangerous drug, as defined ~~as 50-32-101, and listed in Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid prescription or as authorized by law.

~~(2)(4)~~ (4) "Employee" means an individual engaged in the performance, SUPERVISION, OR MANAGEMENT of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION AFFECTING PUBLIC SAFETY, OR FIDUCIARY POSITION for ~~a private~~ AN employer and does not include an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

~~(3)(5)~~ (5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees and that is located in or doing business in Montana.

1 (6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:

2 (A) FOR WHICH ~~DRUG~~ CONTROLLED SUBSTANCE AND ALCOHOL TESTING IS MANDATED BY
3 FEDERAL LAW, SUCH AS AVIATION, ~~INTERSTATE~~ COMMERCIAL MOTOR CARRIER, RAILROAD,
4 PIPELINE, AND COMMERCIAL MARINE EMPLOYEES;

5 (B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION
6 EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR

7 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
8 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

9 (7) "INITIAL TEST" MEANS SCIENTIFICALLY ACCEPTED ANALYTICAL METHODS AND
10 PROCEDURES THAT HAVE BEEN CLEARED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION FOR
11 COMMERCIAL DISTRIBUTION. SPECIMEN COLLECTION AND CHAIN OF CUSTODY PROCEDURES FOR
12 AN INITIAL TEST MUST CONFORM TO 49 CFR, PART 40.

13 (4)(6)(7)(8) "Medical review officer" means a ~~state-licensed~~ LICENSED physician trained in the field
14 of substance abuse.

15 (5)(7)(8)(9) "Prospective employee" means an individual who has made a written or oral application
16 to an employer to become an employee.

17 (6)(8)(9)(10) "Qualified testing program" means a program to test for the presence of controlled
18 substances and alcohol that meets the criteria set forth in [sections 43 and 54].

19 (7)(9)(10)(11) "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled
20 substance or a breath alcohol test to determine the presence of alcohol.

21
22 NEW SECTION. ~~Section 3. Limitations on employer liability.~~ (1) ~~An employer is not liable for~~
23 ~~monetary damages arising out of a drug or alcohol test that the employer requires an employee or~~
24 ~~prospective employee to take if the test is administered pursuant to a qualified testing program that is~~
25 ~~adopted and implemented by an employer to test employees for the presence of controlled substances or~~
26 ~~alcohol, unless:~~

27 ~~(a) the employer took disciplinary action against the employee based on a false test result and the~~
28 ~~employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable~~
29 ~~presumption that an employer's reliance on a test result is reasonable if the employer complies with the~~
30 ~~provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~

1 ~~81.~~
2 ~~(b) the employer committed defamation of character, libel, slander, or damage to reputation, as~~
3 ~~established by statute or common law, by knowingly disclosing false test results with malice.~~
4 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
5 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~
6 ~~abnormality, problem, or defect of any kind.~~

8 **NEW SECTION. Section 3. Qualified testing program.** A qualified testing program must comply
9 with the following criteria:

10 (1) Testing must be conducted according to the terms of written policies and procedures that must
11 be adopted by the employer and must be available for review by all employees and prospective employees
12 60 days before ~~implementation.~~ THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
13 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40, EXCEPT
14 AN INITIAL TEST FOR A CONTROLLED SUBSTANCE OR ALCOHOL MAY BE USED AS PROVIDED IN
15 SUBSECTION (8). At a minimum, the policies and procedures must require:

- 16 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful
17 manufacture, distribution, possession, or use of a controlled substance;
- 18 (b) the employer's ~~proposal~~ PROGRAM for REGULARLY educating or providing information to
19 employees on the health AND WORKPLACE SAFETY risks associated with the use of controlled substances
20 and alcohol;
- 21 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol
22 by employees;
- 23 (d) a description of available employee assistance programs, including drug and alcohol counseling,
24 treatment, or rehabilitation programs that are available to employees;
- 25 (e) a description of the sanctions that the employer may impose on an employee if the employee
26 is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is
27 found to test positive for the presence of a controlled substance or alcohol;
- 28 (f) ~~a statement that employees may be tested, including a discussion~~ DESCRIPTION of the
29 circumstances that may trigger an immediate test IDENTIFICATION OF THE TYPES OF CONTROLLED
30 SUBSTANCE AND ALCOHOL TESTS TO BE USED FROM THE TYPES OF TESTS LISTED IN [SECTION 4];

(g) a list of controlled substances for which the employer intends to test AND A STATED ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) ~~employees or agents of the employer who are specifically authorized by the tested employee to resolve~~ RECEIVE the employee's test results THE DESIGNATED REPRESENTATIVE OF THE EMPLOYER;
or

(iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-87~~] or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection ~~of~~ TRANSPORT, AND CONFIRMATION TESTING OF URINE samples must be performed IN ~~in a manner designed to protect the privacy of the employee, using, when practicable, screens~~

1 ~~or stalls, except that if an employer has reason to believe an employee may adulterate or substitute the~~
2 ~~required sample, the employer may require that the sample be provided under the direct supervision of~~
3 ~~testing personnel.~~

4 ~~(5) Samples must be handled under strict forensic chain-of-custody procedures. The procedures~~
5 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
6 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
7 ~~results.~~

8 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
9 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
10 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~
11 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~
12 ACCORDANCE WITH 49 CFR, PART 40.

13 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
14 have the results reviewed and certified by a medical review officer who is trained in the field of substance
15 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
16 medical review officer of any medical information that is relevant to interpreting test results, including
17 information concerning currently or recently used prescription or nonprescription drugs.

18 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
19 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
20 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

21 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
22 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
23 BODY.

24 (8) AN EMPLOYER MAY USE AN INITIAL TEST TO SCREEN AN EMPLOYEE OR PROSPECTIVE
25 EMPLOYEE FOR THE USE OF A CONTROLLED SUBSTANCE OR ALCOHOL. IF THE INITIAL TEST RESULTS
26 INDICATE A POTENTIAL POSITIVE, THE INITIAL TEST MUST BE CONFIRMED. CONFIRMATION TESTS
27 MUST BE COMPLETED USING COLLECTION, TRANSPORTING, AND TESTING PROCEDURES THAT
28 CONFORM TO 49 CFR, PART 40. ONLY CONFIRMED TEST RESULTS MAY BE USED TO DETERMINE IF
29 AN EMPLOYEE TESTS POSITIVE FOR A CONTROLLED SUBSTANCE OR ALCOHOL. ONLY CONFIRMED
30 POSITIVE OR NEGATIVE TEST RESULTS MAY BE ENTERED INTO AN EMPLOYEE'S PERSONNEL FILE.

1 NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES --
2 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
3 QUALIFIED TESTING PROGRAM:

4 (1) AN EMPLOYER MAY TEST ANY ~~NEWLY HIRED~~ PROSPECTIVE EMPLOYEE AS A CONDITION
5 OF HIRE ~~WITHIN 5 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.~~

6 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
7 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

8 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
9 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
10 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

11 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
12 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

13 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

14 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

15 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
16 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

17 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
18 TESTING PROCESS; AND

19 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
20 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
21 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
22 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
23 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
24 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

25 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
26 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
27 ALCOHOL AT THE WORK SITE EMPLOYEE HAS HAD A VERIFIED POSITIVE TEST FOR A CONTROLLED
28 SUBSTANCE OR FOR ALCOHOL. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
29 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
30 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

1 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
2 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
3 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
4 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
5 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
6 OF REASONABLE SUSPICION.

7 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
8 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
9 HAVE CONTRIBUTED TO EMPLOYEE'S ACT OR FAILURE TO ACT IS A DIRECT OR PROXIMATE CAUSE
10 OF A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL INJURY OR PROPERTY
11 DAMAGE IN EXCESS OF \$1,500.

12
13 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
14 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
15 [SECTION 5 4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
16 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
17 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
18 EMPLOYER SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST RESULTS ARE
19 NEGATIVE, AND THE EMPLOYEE SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST
20 RESULTS ARE POSITIVE. THE EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR
21 EXPLAIN THE RESULTS OF ANY TEST.

22
23 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE NO ADVERSE
24 ACTION, INCLUDING FOLLOWUP TESTING, MAY NOT BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE
25 PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION INDICATING THAT THE ORIGINAL TEST
26 RESULTS WERE NOT CAUSED BY ILLEGAL USE OF CONTROLLED SUBSTANCES OR BY ALCOHOL
27 CONSUMPTION. IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION,
28 THE TEST RESULTS MUST BE REMOVED FROM THE EMPLOYEE'S RECORD AND DESTROYED.

29
30 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and

except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.

Section 8. Section 39-2-304, MCA, is amended to read:

"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~ (1) A person, firm, corporation, or other business entity or its representative may not require:

~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test or any form of a mechanical lie detector test;~~ as a condition for employment or continuation of employment.

~~(b) as a condition for employment, a person to submit to a blood or urine test, except for employment in:~~

~~(i) hazardous work environments;~~

~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a commercial motor carrier or an employee subject to driver qualification requirements; and~~

~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test, except when:~~

~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use;~~

~~(ii) the employer has reason to believe that an employee may have contributed to a work-related accident that causes death or personal injury or property damage in excess of \$1,500; or~~

~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~

~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR, part 40, and make it available to all persons subject to testing.~~

~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of drug or alcohol test results to the person tested and provide the person with the opportunity, at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an independent laboratory selected by the person tested. The person tested must be given the opportunity to rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection (1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its representative shall, as soon as possible, make a written finding as to whether the act or failure to act is believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of the finding. The written record of a blood or urine test of an employee who is required to submit to testing pursuant to subsection (1)(c)(iii) and whose acts or failure to act is subsequently found not to be the direct or proximate cause of a work-related accident must be removed from the employee's work record and be destroyed.~~

~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results of the test were not caused by alcohol consumption or illegal drug use.~~

~~(5) A person who violates this section is guilty of a misdemeanor.~~

~~(6) As used in this section:~~

~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

~~(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this state."~~

NEW SECTION. Section 9. Codification instruction. [Sections 1 through ~~5-8~~ 7] are intended to be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2, apply to [sections 1 through ~~5-8~~ 7].

NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT] IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID

1 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

2 -END-

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

CONFERENCE COMMITTEE ON HOUSE BILL 345

Call to Order: By CHAIRMAN TOM KEATING, on April 16, 1997, at 8:30 A.M., in ROOM 108.

ROLL CALL

Members Present:

Rep. Gay Ann Masolo (R)
Rep. Charles R. Devaney (R)
Rep. Jon Ellingson (D)
Sen. Thomas F. Keating (R)
Sen. Bill Wilson (D)
Sen. Fred Thomas (R)

Members Excused: None

Members Absent: None

Staff Present: Eddy McClure, Staff Attorney
Steve Meloy, Staff Attorney
Jaelene Racicot, Secretary

EXECUTIVE ACTION ON HB 345

Discussion:

SEN. KEATING stated the HB 345 Senate amendments were rejected by the House. {Tape: 1; Side: A; Approx. Time Count: .3.}

REP. MASOLO asked Carl Schweitzer to speak on the amendments. REP. MASOLO stated accepting other tests that were not in the original bill was the main objection on the Senate amendments. {Tape: 1; Side: A; Approx. Time Count: 1.1.}

SEN KEATING explained the two types of tests and the costs involved in the testing process. {Tape: 1; Side: A; Approx. Time Count: 5.3.}

REP. MASOLO stated she didn't know if the House had trouble with the whole bill or just the Senate amendments. {Tape: 1; Side: A; Approx. Time Count: 8.1.}

REP. ELLINGSON stated the House was concern with the initial test that wouldn't be as accurate as the laboratory test. {Tape: 1; Side: A; Approx. Time Count: 8.5.}

SEN. KEATING stated if the initial test positive, the test could not be used for a basis for hiring. *{Tape: 1; Side: A; Approx. Time Count: 10.0.}*

SEN. THOMAS asked Dan Edwards, National Representative of OCW, what the cost was on the initial test verses the DOT test. *{Tape: 1; Side: A; Approx. Time Count: 11.6.}*

SEN. THOMAS asked Carl Schweitzer about the costs on the first initial test and the DOT tests. Mr. Schweitzer stated \$37 to \$38 for a DOT test. *{Tape: 1; Side: A; Approx. Time Count: 14.4.}*

SEN. THOMAS asked what \$37 included. Mr. Schweitzer stated it was the collection, test and the MRO's analysis of the sample. *{Tape: 1; Side: A; Approx. Time Count: 15.0.}*

SEN. THOMAS asked if this would be the full test. Mr. Schweitzer stated it was the complete test for the first initial test. *{Tape: 1; Side: A; Approx. Time Count: 15.5.}*

SEN. THOMAS asked what would be tested beyond that point. Mr. Schweitzer if the initial test came back positive. The employer would take a second sample and send the sample to another lab. This would be more expensive. Mr. Schweitzer thought maybe \$80 to \$100 for the test. *{Tape: 1; Side: A; Approx. Time Count: 16.4.}*

SEN. WILSON stated the first test would be worthless because of the masking agents used to beat a first test. Mr. Schweitzer referred to page 2, number 7 to answer the question. *{Tape: 1; Side: A; Approx. Time Count: 16.7.}*

SEN. WILSON asked Mr. Schweitzer about the cheaper test. *{Tape: 1; Side: A; Approx. Time Count: 20.3.}*

SEN. WILSON stated they should have the most expensive and safest test. *{Tape: 1; Side: A; Approx. Time Count: 21.5.}*

REP. DEVANEY said Interstate Truckers were required to set-up a drug testing program in the late '80's and there was no initial test. They administered the "top shelf" test. *{Tape: 1; Side: A; Approx. Time Count: 21.8.}*

REP. ELLINGSON stated he had received a lot of information on how to mask the positives. *{Tape: 1; Side: A; Approx. Time Count: 23.2.}*

SEN. WILSON gave a scenario. *{Tape: 1; Side: A; Approx. Time Count: 24.3.}*

SEN. KEATING asked about the initial test and if was came back positive would a new sample be taken or do they use the old sample. Mr. Schweitzer stated it was clarified in the bill as what was expected. *{Tape: 1; Side: A; Approx. Time Count: 26.7.}*

SEN. KEATING asked Dan Edwards to respond to the question.
{Tape: 1; Side: A; Approx. Time Count: 28.0.}

REP. DEVANEY asked Mr. Edwards about the process in which the test are taken. {Tape: 1; Side: A; Approx. Time Count: 29.1.}

REP. MASOLO asked Mr. Edwards if the test were legal. {Tape: 1; Side: A; Approx. Time Count: 30.2.} Mr. Edwards explained the current law and why they were not legal.

SEN. WILSON stated he did not have a problem with the bill just with the initial test and if the cost factor was a major concern.
{Tape: 1; Side: B; Approx. Time Count: .3.}

REP. DEVANEY felt from the perspective of an employer, it would be cheaper to pay for the DOT test. {Tape: 1; Side: B; Approx. Time Count: 3.3.}

SEN. THOMAS asked Bob Gilbert to comment on the entire process of DOT testing. {Tape: 1; Side: B; Approx. Time Count: 5.0.}

REP. DEVANEY commented on the process of DOT testing. {Tape: 1; Side: B; Approx. Time Count: 10.3.}

REP. MASOLO stated the employee had the right to review the test before anyone could. {Tape: 1; Side: B; Approx. Time Count: 10.8.}

REP. DEVANEY said he would like to change section 7 to eliminate the initial test. {Tape: 1; Side: B; Approx. Time Count: 11.3.}

REP. MASOLO asked for clarification from SEN KEATING. {Tape: 1; Side: B; Approx. Time Count: 12.5.}

Steve Meloy stated the three amendments were connected with the initial test. {Tape: 1; Side: B; Approx. Time Count: 13.9.}

SEN. KEATING asked Mr. Meloy if the committee could strike the three amendments pertaining to the initial test. {Tape: 1; Side: B; Approx. Time Count: 14.4.}

Motion: REP. DEVANEY MOVED TO STRIKE 4, 5, AND 10 FROM THE SENATE AMENDMENTS. {Tape: 1; Side: B; Approx. Time Count: 15.7.}

Discussion:

SEN. WILSON asked for a clarification on the motion. {Tape: 1; Side: B; Approx. Time Count: 16.5.}

SEN. KEATING talked about the Bartlett amendment on the Senate floor. {Tape: 1; Side: B; Approx. Time Count: 17.6.}

SEN. KEATING asked Mr. Schweitzer if there was initial drug testing in the body of the bill. {Tape: 1; Side: B; Approx. Time Count: 18.6.}

SEN. THOMAS asked SEN. KEATING how the motion would read. {Tape: 1; Side: B; Approx. Time Count: 19.5.}

REP. DEVANEY asked if the motion pass, would it passed both houses? {Tape: 1; Side: B; Approx. Time Count: 20.7.}

SEN. WILSON stated if the discussion that took place before the conference committee would have taken place on the Senate floor; the bill would not be in the conference committee. {Tape: 1; Side: B; Approx. Time Count: 21.3.}

REP. DEVANEY stated there was contention on third reading on the House floor. {Tape: 1; Side: B; Approx. Time Count: 21.9}

Vote: THE MOTION CARRIED UNANIMOUSLY. {Tape: 1; Side: B; Approx. Time Count: 22.7.}

Discussion:

REP. DEVANEY asked for a clarification on the 60 days implementation. {Tape: 1; Side: B; Approx. Time Count: 23.5.}

SEN. KEATING asked Carl Schweitzer to comment on the 60 days notice. {Tape: 1; Side: B; Approx. Time Count: 24.9.}

SEN. THOMAS asked Mr. Schweitzer on the 60 days notice. {Tape: 1; Side: B; Approx. Time Count: 28.2.}

SEN. KEATING stated if the committee would like to propose an amendment with the language "perspective employees" the committee could ask for a Free Conference Committee to be appointed. {Tape: 2; Side: A; Approx. Time Count: 0.}

SEN. THOMAS stated the Supreme Courts ruling testing of public officials is void. {Tape: 2; Side: A; Approx. Time Count: 1.0.}

REP. DEVANEY asked Mr. Meloy to comment. {Tape: 2; Side: A; Approx. Time Count: 1.7.}

SEN. KEATING asked Mr. Schweitzer about reasonable suspicion. {Tape: 2; Side: A; Approx. Time Count: 3.6.}

SEN. WILSON referred to mandatory testing. {Tape: 2; Side: A; Approx. Time Count: 4.8.}

Dan Edwards commented to SEN. WILSON'S comment. {Tape: 2; Side: A; Approx. Time Count: 5.5.}

SEN. KEATING stated that instead of having the committee meet again it would be better to strike the language "perspective employees". {Tape: 2; Side: A; Approx. Time Count: 6.0.}

Motion: REP. DEVANEY MOVED TO STRIKE PERSPECTIVE EMPLOYEES FROM LINE 11 AND THE COMMITTEE BE REAPPOINTED TO A FREE CONFERENCE COMMITTEE. {Tape: 2; Side: A; Approx. Time Count: 7.2.}

Vote: THE MOTION CARRIED UNANIMOUSLY. {Tape: 2; Side: A; Approx. Time Count: 7.6.}

Motion/Vote: REP. MASOLO MOVED HB 345 DO CONCUR AS AMENDED. A ROLL CALL VOTE WAS TAKEN. THE MOTION CARRIED UNANIMOUSLY. {Tape: 2; Side: A; Approx. Time Count: 7.9.}

1600



FREE CONFERENCE COMMITTEE

on House Bill 345
Report No. 1, April 16, 1997

Page 1 of 1

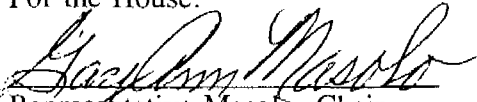
Mr. Speaker and Mr. President:

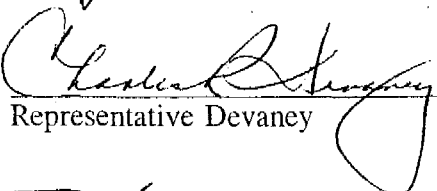
We, your Free Conference Committee met and considered **House Bill 345** (reference copy -- salmon) and recommend that **House Bill 345** be amended as follows:

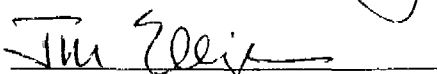
1. Page 3, line 11.
Following: "all employees"
Strike: "and prospective employees"

And this FREE Conference Committee report be adopted.

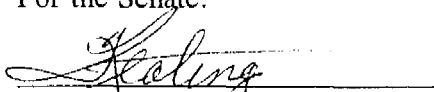
For the House:

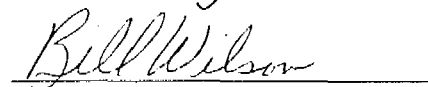

Representative Masolo, Chair


Representative Devaney


Representative Eljington

For the Senate:


Senator Keating, Chair


Senator Wilson


Senator Thomas

ADOPT

AC HB 345-1

REJECT

811128CC.Hgd

161



FREE CONFERENCE COMMITTEE

on House Bill 345
Report No. 1, April 16, 1997

Page 1 of 1

Mr. Speaker and Mr. President:

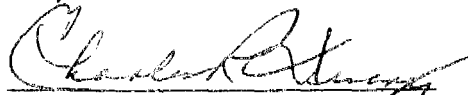
We, your Free Conference Committee met and considered **House Bill 345** (reference copy -- salmon) and recommend that **House Bill 345** be amended as follows:

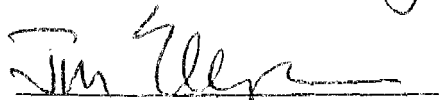
1. Page 2, lines 9 through 12.
Strike: subsection (7) in its entirety
Renumber: subsequent subsections
2. Page 3, line 11.
Following: "all employees"
Strike: "and prospective employees"
3. Page 3, lines 13 through 15.
Following: "PART 40" on line 13
Strike: the remainder of line 13 through "(8)" on line 15
4. Page 5, lines 24 through 30.
Strike: subsection (8) in its entirety

And this FREE Conference Committee report be adopted.

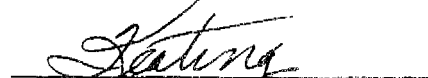
For the House:


Representative Masolo, Chair

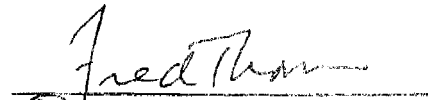

Representative Devaney


Representative Ellingson

For the Senate:


Senator Keating, Chair


Senator Wilson


Senator Thomas

ADOPT

REJECT

FCCR #1

AC HB 345-1

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HB 345

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CONFERENCE COMMITTEE

on House Bill 345
Report No. 2, April 16, 1997

Page 1 of 1

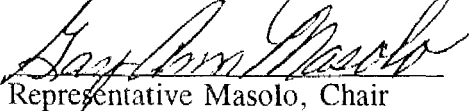
Mr. Speaker and Mr. President:

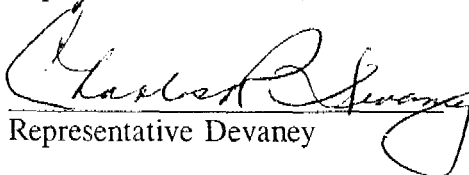
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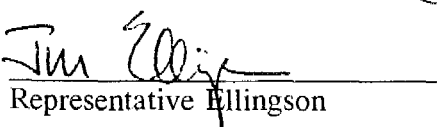
1. Page 2, lines 9 through 12.
Strike: subsection (7) in its entirety
Renumber: subsequent subsections
2. Page 3, lines 13 through 15.
Following: "PART 40" on line 13
Strike: the remainder of line 13 through "(8)" on line 15
3. Page 5, lines 24 through 30.
Strike: subsection (8) in its entirety

And this Conference Committee report be adopted.

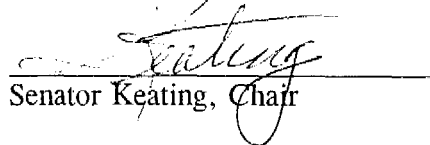
For the House:

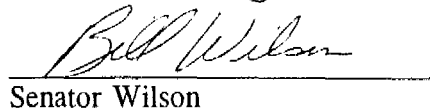

Representative Masolo, Chair

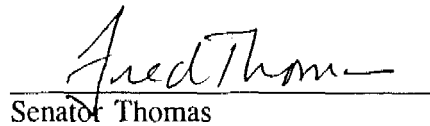

Representative Devaney


Representative Ellingson

For the Senate:


Senator Keating, Chair


Senator Wilson


Senator Thomas

ADOPT

REJECT

CCR #2

AC HB 345-2

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HB 345

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2nd Reading - Committee of Whole

HOUSE JOURNAL
EIGHTY-THIRD LEGISLATIVE DAY - APRIL 18, 1997

Representative Sliter assumed the Chair at this time.

HB 188 - Representative Denny moved the free conference committee report to HB 188 be adopted. Motion carried as follows:

Ayes: Anderson, Barnett, Beaudry, Bergman, Bitney, Bohlinger, Bookout, Carey, Cocchiarella, Curtiss, Denny, Devaney, Dowell, Ellis, Ewer, Galvin, Gillan, Grady, Grimes, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kitzenberg, Kottel, Krenzler, Lawson, Marshall, Masolo, McCulloch, Menahan, Mills, Ohs, Pavlovich, Pease, Quilici, Ream, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Sliter, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Wells, Whitehead, Wiseman, Zook, Mr. Speaker.
Total 67

Noes: Adams, Arnott, Bankhead, Barnhart, Bergsagel, Boharski, Brainard, Clark, Cobb, DeBruycker, Ellingson, Feland, Heavy Runner, Jore, Kasten, Keenan, McCann, McGee, Molnar, Mood, Orr, Peck, Prouse, Raney, Rehbein, Tuss, Vick, Wagner, Walters, Wyatt.
Total 30

Voted Absentee: Wells, Aye.

Excused: Knox.
Total 1

Absent or not voting: Ahner, Grinde.
Total 2

HB 345 - Representative Masolo moved the free conference committee report to HB 345 be adopted. Motion carried as follows:

Ayes: Ahner, Anderson, Bankhead, Barnett, Beaudry, Bergman, Bitney, Bohlinger, Bookout, Carey, Clark, Cocchiarella, Curtiss, DeBruycker, Devaney, Ellingson, Ellis, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Hayne, Hibbard, Holland, R. Johnson, Kitzenberg, Lawson, Marshall, Masolo, McCann, Menahan, Mills, Mood, Ohs, Pease, Peck, Rehbein, Rose, Simon, Simpkins, Sliter, Smith, Soft, Squires, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Wiseman, Zook, Mr. Speaker.
Total 55

Noes: Adams, Arnott, Barnhart, Bergsagel, Boharski, Brainard, Cobb, Dowell, Ewer, Feland, Galvin, Gillan, Harper, Harrington, Heavy Runner, Hurdle, J. Johnson, Jore, Kasten, Keenan, Kottel, Krenzler, McCulloch, McGee, Molnar, Orr, Pavlovich, Prouse, Quilici, Raney, Ream, Ryan, Sands, Schmidt, Simpson, Story, Tuss, Vick, Wagner, Walters, Wells, Whitehead, Wyatt.
Total 43

Voted Absentee: Wells, No.

Excused: Knox.
Total 1

Absent or not voting: Denny.

HOUSE JOURNAL
EIGHTY-THIRD LEGISLATIVE DAY - APRIL 18, 1997

Total 1

Representative Devaney resumed the Chair at this time.

HB 369 - Representative Brainard moved the free conference committee report to HB 369 be adopted. Motion carried as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Carey, Clark, Cobb, Cocchiarella, Curtiss, Denny, Devaney, Dowell, Ellingson, Ellis, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Raney, Ream, Rehbein, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Wagner, Walters, Wells, Whitehead, Wiseman, Zook, Mr. Speaker.

Total 95

Noes: Wyatt.

Total 1

Voted Absentee: Wells, Aye.

Excused: Knox.

Total 1

Absent or not voting: DeBruycker, Ewer, Sliter.

Total 3

HB 389 - Representative Simon moved the free conference committee report to HB 389 be adopted. Motion carried as follows:

Ayes: Adams, Ahner, Anderson, Arnott, Bankhead, Barnett, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Boharski, Bohlinger, Bookout, Brainard, Carey, Clark, Cobb, Cocchiarella, Curtiss, DeBruycker, Denny, Devaney, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Kottel, Krenzler, Lawson, Marshall, Masolo, McCann, McCulloch, McGee, Menahan, Mills, Molnar, Mood, Ohs, Orr, Pavlovich, Pease, Peck, Prouse, Quilici, Raney, Ream, Rehbein, Rose, Ryan, Sands, Schmidt, Simon, Simpkins, Simpson, Sliter, Smith, Soft, Squires, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Wagner, Walters, Wells, Whitehead, Wiseman, Wyatt, Zook, Mr. Speaker.

Total 99

Noes: None.

Total 0

Voted Absentee: Wells, Aye.

Excused: Knox.

Total 1

HOUSE JOURNAL
EIGHTY-FOURTH LEGISLATIVE DAY - APRIL 19, 1997

HB 298, HB 339, HB 561, HB 599, HB 601, HB 610.

Representative Grinde moved the House recess until 1:30 p.m. Motion carried.

House recessed at 11:06 a.m.

House reconvened at 1:34 p.m. Mr. Speaker in the Chair.
Roll call. Quorum present.

Mr. Speaker: We, your committee on Legislative Administration/Bills and Journal, having examined the daily journal for the eighty-second legislative day, find the same to be correct.

Hayne, Chairman

MESSAGES FROM THE SENATE

The Senate on motion duly carried, on 4/19/97, overrode the Governor's Veto on **SB 271** and the bill is transmitted to the House for a vote to override.

House bill concurred in and returned to the House: 4/19/97

HB 616, introduced by Anderson

House joint resolution not concurred in and returned to the House: 4/19/97

HJR 33, introduced by Denny

Conference committee report #1 adopted: 4/19/97

SB 272, introduced by Aklestad

SB 283, introduced by Burnett

SB 339, introduced by Grosfield

Free conference committee report #1 adopted: 4/19/97

SB 57, introduced by Waterman

SB 195, introduced by Harp

SB 374, introduced by Hargrove

Governor's amendments concurred in: 4/19/97

SB 87, introduced by Jergeson

Free conference committee reports adopted: 4/19/97

HB 17, introduced by Pavlovich

HB 83, introduced by Bergsagel

HB 122, introduced by McGee

HOUSE JOURNAL
EIGHTY-FOURTH LEGISLATIVE DAY - APRIL 19, 1997

HB 135, introduced by Smith
HB 188, introduced by Denny
HB 345, introduced by Masolo
HB 369, introduced by Brainard
HB 389, introduced by Simon
HB 398, introduced by R. Johnson
HB 517, introduced by Vick
HB 547, introduced by Rehbein

Free conference committee report #3 adopted:

4/19/97

SB 44, introduced by Holden

Conference committee reports adopted:

4/19/97

HB 99, introduced by Trexler
HB 584, introduced by Knox

MOTIONS

SB 271 - Representative Bankhead moved the House override the Governor's Veto on SB 271. Motion carried. (70-29)

Representative Harper moved the rules be suspended to permit placement and consideration of SB 367 on third reading this legislative day. Motion carried.

SB 31 - Representative Kottel moved the House override the Governor's Veto on SB 31. Representative Kottel withdrew her motion.

HB 268 - Representative Kottel moved the House override the Governor's Veto on HB 268. Motion carried. (82-14)

**SECOND READING OF BILLS
(COMMITTEE OF THE WHOLE)**

Representative Grinde moved the House resolve itself into a Committee of the Whole for consideration of business on second reading. Motion carried. Representative Ream in the Chair.

Mr. Speaker: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

HB 13 - Representative Wiseman moved the free conference committee report to HB 13 be adopted. Motion carried as follows:

Ayes: Ahner, Anderson, Bankhead, Barnhart, Beaudry, Bergman, Bergsagel, Bitney, Bohlinger, Bookout, Carey, Clark, Cobb, Cocchiarella, DeBruycker, Denny, Devaney, Dowell, Ellingson, Ellis, Ewer, Feland, Galvin, Gillan, Grady, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Hibbard, Holland, Hurdle, J. Johnson, R. Johnson, Kasten, Kottel, Krenzler, Lawson, Marshall, Masolo, McCulloch, McGee,

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Excused: Burnett, Halligan, Swysgood.
Total 3

HB 99-Conference Committee Report No.1 - Senator Mohl moved the Conference Committee report to HB 99 be adopted. Motion carried unanimously.

HB 122-Free Conference Committee Report No.1 - Senator Grosfield moved the Free Conference Committee report to HB 122 be adopted. Motion carried with Senators Christiaens and Brooke voting nay.

HB 135-Free Conference Committee Report No.1 - Senator Bishop moved the Free Conference Committee report to HB 135 be adopted. Motion carried unanimously.

HB 142 - Senator Hertel moved HB 142 be concurred in.

After discussion, Senator Lynch made a substitute motion that consideration of HB 142 be indefinitely postponed. Motion carried as follows:

Yeas: Bartlett, Beck, Bishop, Christiaens, DePratu, Devlin, Doherty, Eck, Estrada, Franklin, Gage, Glaser, Grosfield, Harp, Jenkins, Lynch, Mahlum, McCarthy, McNutt, Nelson, Shea, Sprague, Stang, Toews, Waterman, Wilson.
Total 26

Nays: Baer, Benedict, Brooke, Cole, Crippen, Crismore, Emerson, Foster, Hargrove, Hertel, Holden, Jabs, Jergeson, Keating, Mesaros, Miller, Mohl, Taylor, Thomas, Van Valkenburg, Mr. President.
Total 21

Absent or not voting: None.
Total 0

Excused: Burnett, Halligan, Swysgood.
Total 3

HB 83-Free Conference Committee Report No.1 - Senator Beck moved the Free Conference Committee report to HB 83 be adopted. Motion carried unanimously.

HB 188-Free Conference Committee Report No.1 - Senator Keating moved the Free Conference Committee report to HB 188 be adopted. Motion carried with Senators Stang, Baer and Glaser voting nay.

HB 345-Free Conference Committee, Report No.3 - Senator Keating moved the Free Conference Committee report #3 to HB 345 be adopted. Motion carried unanimously.

HB 369-Free Conference Committee Report No.1 - Senator Sprague moved the Free Conference Committee Report to HB 369 be adopted. Motion carried unanimously.

HB 389-Free Conference Committee Report No.1 - Senator Gage moved the Free Conference Committee report to HB 389 be adopted. Motion carried unanimously.

Senator Halligan present at this time.

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Hargrove, Chairman
Waterman,
Keating, (unsigned)

Soft, Chairman
Sands
Boharski (unsigned)

MESSAGES FROM THE OTHER HOUSE

Conference Committee report #1 not adopted on the following bill: 4/18/97

SB 381, introduced by Benedict

Conference Committee report #1 adopted on the following bills: 4/18/97

SB 71, introduced by Toews

SB 381, introduced by Benedict (reconsidered)

HB 99, introduced by Trexler

Free Conference Committee report #1 adopted on the following bills: 4/18/97

HB 83, introduced by Bergsagel

HB 102, introduced by Beaudry

HB 135, introduced by Smith

HB 164, introduced by Tuss

HB 188, introduced by Denny

HB 339, introduced by Carey

HB 345, introduced by Masolo

HB 346, introduced by Tropila

HB 369, introduced by Brainard

HB 388, introduced by Simon

HB 389, introduced by Simon

HB 398, introduced by R.Johnson

Free Conference Committee report #2 adopted on the following bill: 4/18/97

SB 85, introduced by Jergeson

SB 207 - The House acceded to the request of the Senate and dissolved the Conference Committee on SB 207 and authorized the Speaker to appoint the following Free Conference Committee to meet with a like committee from the Senate on SB 207:

Representative Arnott, Chairman

Representative Stovall

Representative Peck

SB 374 - The House acceded to the request of the Senate and authorized the Speaker to appoint the following Free Conference Committee to meet with a like committee from the Senate on SB 374:

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Total 0

Excused: Bartlett, Burnett, McCarthy.

Total 3

HB 345-Free Conference Committee Report No.3, concurred in as follows:

Yeas: Baer, Beck, Benedict, Burnett, Cole, Crismore, DePratu, Devlin, Emerson, Estrada, Foster, Gage, Glaser, Grosfield, Hargrove, Hertel, Holden, Jabs, Jenkins, Keating, Mahlum, McNutt, Mesaros, Miller, Mohl, Nelson, Sprague, Stang, Taylor, Thomas, Toews, Mr. President.

Total 32

Nays: Bartlett, Bishop, Brooke, Christiaens, Crippen, Doherty, Eck, Franklin, Halligan, Harp, Jergeson, Lynch, McCarthy, Shea, Swysgood, Van Valkenburg, Waterman, Wilson.

Total 18

Paired: Burnett, Mesaros, Thomas, Aye; Bartlett, Doherty, McCarthy, No.

Absent or not voting: None.

Total 0

Excused: None.

Total 0

HB 369-Free Conference Committee Report No.1, concurred in as follows:

Yeas: Baer, Beck, Benedict, Bishop, Brooke, Christiaens, Cole, Crippen, Crismore, DePratu, Devlin, Doherty, Eck, Emerson, Estrada, Foster, Franklin, Gage, Glaser, Grosfield, Halligan, Hargrove, Harp, Hertel, Holden, Jabs, Jenkins, Jergeson, Keating, Lynch, Mahlum, McNutt, Mesaros, Miller, Mohl, Nelson, Shea, Sprague, Stang, Swysgood, Taylor, Thomas, Toews, Van Valkenburg, Waterman, Wilson, Mr. President.

Total 47

Nays: None.

Total 0

Absent or not voting: None.

Total 0

Excused: Bartlett, Burnett, McCarthy.

Total 3

HB 389-Free Conference Committee Report No.1, concurred in as follows:

Yeas: Baer, Beck, Benedict, Bishop, Christiaens, Cole, Crippen, Crismore, DePratu, Devlin, Doherty, Eck, Emerson, Estrada, Foster, Gage, Glaser, Grosfield, Halligan, Hargrove, Harp, Hertel, Holden, Jabs, Jenkins, Jergeson, Keating, Lynch, Mahlum, McNutt, Mesaros, Miller, Mohl, Nelson, Shea, Sprague, Stang, Swysgood, Taylor, Thomas, Toews, Van Valkenburg, Waterman, Wilson, Mr. President.

Total 45

HOUSE BILL NO. 345

INTRODUCED BY MASOLO

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL TESTING PROGRAMS;~~ PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through ~~5-8 7~~] may be cited as the "~~Private Workforce~~ WORKFORCE Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8 7~~], the following definitions apply:

(1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

(2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL BREATH TEST.

~~(1)(3)~~ (3) "Controlled substance" means a dangerous drug, as defined ~~as 50-32-101, and listed in Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid prescription or as authorized by law.

~~(2)(4)~~ (4) "Employee" means an individual engaged in the performance, SUPERVISION, OR MANAGEMENT of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION AFFECTING PUBLIC SAFETY, OR FIDUCIARY POSITION for a ~~private~~ AN employer and does not include an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

~~(3)(5)~~ (5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees and that is located in or doing business in Montana.

(6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:

(A) FOR WHICH ~~DRUG~~ CONTROLLED SUBSTANCE AND ALCOHOL TESTING IS MANDATED BY FEDERAL LAW, SUCH AS AVIATION, INTERSTATE COMMERCIAL MOTOR CARRIER, RAILROAD, PIPELINE, AND COMMERCIAL MARINE EMPLOYEES;

(B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR

(C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES, TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

~~(7) "INITIAL TEST" MEANS SCIENTIFICALLY ACCEPTED ANALYTICAL METHODS AND PROCEDURES THAT HAVE BEEN CLEARED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION FOR COMMERCIAL DISTRIBUTION. SPECIMEN COLLECTION AND CHAIN OF CUSTODY PROCEDURES FOR AN INITIAL TEST MUST CONFORM TO 49 CFR, PART 40.~~

~~(4)(6)(7)(8)(7)~~ "Medical review officer" means a ~~state licensed~~ LICENSED physician trained in the field of substance abuse.

~~(5)(7)(9)(9)(8)~~ "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

~~(6)(8)(9)(10)(9)~~ "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in [sections 4 3 and 5 4].

~~(7)(9)(10)(11)(10)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled substance or a breath alcohol test to determine the presence of alcohol.

~~NEW SECTION. Section 3. Limitations on employer liability. (1) An employer is not liable for monetary damages arising out of a drug or alcohol test that the employer requires an employee or prospective employee to take if the test is administered pursuant to a qualified testing program that is adopted and implemented by an employer to test employees for the presence of controlled substances or alcohol, unless:~~

~~(a) the employer took disciplinary action against the employee based on a false test result and the employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable presumption that an employer's reliance on a test result is reasonable if the employer complies with the provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~

1 ~~81.~~

2 ~~(b) the employer committed defamation of character, libel, slander, or damage to reputation, as~~
3 ~~established by statute or common law, by knowingly disclosing false test results with malice.~~

4 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
5 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~
6 ~~abnormality, problem, or defect of any kind.~~

7

8 **NEW SECTION. Section 3. Qualified testing program.** A qualified testing program must comply
9 with the following criteria:

10 (1) Testing must be conducted according to the terms of written policies and procedures that must
11 be adopted by the employer and must be available for review by all employees and prospective employees
12 60 days before implementation. THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
13 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40, EXCEPT
14 AN INITIAL TEST FOR A CONTROLLED SUBSTANCE OR ALCOHOL MAY BE USED AS PROVIDED IN
15 SUBSECTION (8). At a minimum, the policies and procedures must require:

16 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful
17 manufacture, distribution, possession, or use of a controlled substance;

18 (b) the employer's ~~proposal~~ PROGRAM for REGULARLY educating or providing information to
19 employees on the health AND WORKPLACE SAFETY risks associated with the use of controlled substances
20 and alcohol;

21 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol
22 by employees;

23 (d) a description of available employee assistance programs, including drug and alcohol counseling,
24 treatment, or rehabilitation programs that are available to employees;

25 (e) a description of the sanctions that the employer may impose on an employee if the employee
26 is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is
27 found to test positive for the presence of a controlled substance or alcohol;

28 (f) ~~a statement that employees may be tested, including a discussion~~ DESCRIPTION of the
29 ~~circumstances that may trigger an immediate test~~ IDENTIFICATION OF THE TYPES OF CONTROLLED
30 SUBSTANCE AND ALCOHOL TESTS TO BE USED FROM THE TYPES OF TESTS LISTED IN [SECTION 4];

(g) a list of controlled substances for which the employer intends to test AND A STATED ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) ~~employees or agents of the employer who are specifically authorized by the tested employee to resolve~~ RECEIVE the employee's test results THE DESIGNATED REPRESENTATIVE OF THE EMPLOYER;

or

(iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-8~~ 7] or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection of, TRANSPORT, AND CONFIRMATION TESTING OF URINE samples must be performed IN ~~in a manner designed to protect the privacy of the employee, using, when practicable, screens~~

1 ~~or stalls, except that if an employer has reason to believe an employee may adulterate or substitute the~~
2 ~~required sample, the employer may require that the sample be provided under the direct supervision of~~
3 ~~testing personnel.~~

4 ~~(5) Samples must be handled under strict forensic chain of custody procedures. The procedures~~
5 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
6 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
7 ~~results.~~

8 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
9 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
10 ~~screening test must be conducted by the same laboratory using gas chromatography-mass spectrometry~~
11 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~
12 ACCORDANCE WITH 49 CFR, PART 40.

13 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
14 have the results reviewed and certified by a medical review officer who is trained in the field of substance
15 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
16 medical review officer of any medical information that is relevant to interpreting test results, including
17 information concerning currently or recently used prescription or nonprescription drugs.

18 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
19 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
20 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

21 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
22 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
23 BODY.

24 ~~(8) AN EMPLOYER MAY USE AN INITIAL TEST TO SCREEN AN EMPLOYEE OR PROSPECTIVE~~
25 ~~EMPLOYEE FOR THE USE OF A CONTROLLED SUBSTANCE OR ALCOHOL. IF THE INITIAL TEST RESULTS~~
26 ~~INDICATE A POTENTIAL POSITIVE, THE INITIAL TEST MUST BE CONFIRMED. CONFIRMATION TESTS~~
27 ~~MUST BE COMPLETED USING COLLECTION, TRANSPORTING, AND TESTING PROCEDURES THAT~~
28 ~~CONFORM TO 49 CFR, PART 40. ONLY CONFIRMED TEST RESULTS MAY BE USED TO DETERMINE IF~~
29 ~~AN EMPLOYEE TESTS POSITIVE FOR A CONTROLLED SUBSTANCE OR ALCOHOL. ONLY CONFIRMED~~
30 ~~POSITIVE OR NEGATIVE TEST RESULTS MAY BE ENTERED INTO AN EMPLOYEE'S PERSONNEL FILE.~~

1 NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES
2 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
3 QUALIFIED TESTING PROGRAM:

4 (1) AN EMPLOYER MAY TEST ANY NEWLY HIRED PROSPECTIVE EMPLOYEE AS A CONDITION
5 OF HIRE WITHIN 5 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.

6 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
7 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

8 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
9 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
10 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

11 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
12 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

13 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

14 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

15 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
16 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

17 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
18 TESTING PROCESS; AND

19 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
20 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
21 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
22 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
23 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
24 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

25 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
26 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
27 ALCOHOL AT THE WORK SITE EMPLOYEE HAS HAD A VERIFIED POSITIVE TEST FOR A CONTROLLED
28 SUBSTANCE OR FOR ALCOHOL. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
29 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
30 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

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1 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
2 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
3 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
4 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
5 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
6 OF REASONABLE SUSPICION.

7 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
8 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
9 HAVE CONTRIBUTED TO EMPLOYEE'S ACT OR FAILURE TO ACT IS A DIRECT OR PROXIMATE CAUSE
10 OF A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL INJURY OR PROPERTY
11 DAMAGE IN EXCESS OF \$1,500.

12
13 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
14 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
15 [SECTION 5 4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
16 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
17 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
18 EMPLOYER SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST RESULTS ARE
19 NEGATIVE, AND THE EMPLOYEE SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST
20 RESULTS ARE POSITIVE. THE EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR
21 EXPLAIN THE RESULTS OF ANY TEST.

22
23 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE NO ADVERSE
24 ACTION, INCLUDING FOLLOWUP TESTING, MAY NOT BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE
25 PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION INDICATING THAT THE ORIGINAL TEST
26 RESULTS WERE NOT CAUSED BY ILLEGAL USE OF CONTROLLED SUBSTANCES OR BY ALCOHOL
27 CONSUMPTION. IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION,
28 THE TEST RESULTS MUST BE REMOVED FROM THE EMPLOYEE'S RECORD AND DESTROYED.

29
30 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and

except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.

Section 8. Section 39-2-304, MCA, is amended to read:

"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~ (1) A person, firm, corporation, or other business entity or its representative may not require:

(a) ~~as a condition for employment or continuation of employment,~~ a person to take a polygraph test or any form of a mechanical lie detector test; as a condition for employment or continuation of employment

(b) ~~as a condition for employment, a person to submit to a blood or urine test, except for employment in:~~

(i) ~~hazardous work environments;~~

(ii) ~~jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

(iii) ~~jobs involving the intrastate commercial transportation of persons or commodities by a commercial motor carrier or an employee subject to driver qualification requirements; and~~

(c) ~~as a condition for continuation of employment, an employee to submit to a blood or urine test, except when:~~

(i) ~~the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use;~~

(ii) ~~the employer has reason to believe that an employee may have contributed to a work-related accident that causes death or personal injury or property damage in excess of \$1,500; or~~

(iii) ~~drug testing is being conducted at an employee's regular biennial physical for employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

(2) ~~Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~

business entity or its representative shall adopt the written testing procedure that is provided in 48 CFR, part 40, and make it available to all persons subject to testing.

~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of drug or alcohol test results to the person tested and provide the person with the opportunity, at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an independent laboratory selected by the person tested. The person tested must be given the opportunity to rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection (1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its representative shall, as soon as possible, make a written finding as to whether the act or failure to act is believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of the finding. The written record of a blood or urine test of an employee who is required to submit to testing pursuant to subsection (1)(c)(ii) and whose acts or failure to act is subsequently found not to be the direct or proximate cause of a work-related accident must be removed from the employee's work record and be destroyed.~~

~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results of the test were not caused by alcohol consumption or illegal drug use.~~

~~(5) A person who violates this section is guilty of a misdemeanor.~~

~~(6) As used in this section:~~

~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

~~(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this state."~~

NEW SECTION. Section 9. Codification instruction. [Sections 1 through ~~5-8~~ 7] are intended to be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2, apply to [sections 1 through ~~5-8~~ 7].

NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT] IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID

1 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

2 -END-

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